No. 97-1642-CFX Title: Department of the Army, Petitioner
v.
Blue Fox, Inc.

Docketed: April 7, 1998 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jan 26 1998	Application (A97-538) to extend the time to file a petition for a writ of certiorari from February 5, 1998 to March 7, 1998, submitted to Justice O'Connor.
	Jan 27 1998	Application (A97-538) granted by Justice O'Connor extending the time to file until March 7, 1998.
	Feb 25 1998	Application (A97-538) to extend further the time to file a petition for a writ of certiorari from March 7, 1998 to April 6, 1998, submitted to Justice O'Connor.
	Feb 26 1998	Application (A97-538) granted by Justice O'Connor extending the time to file until April 6, 1998.
	Apr 6 1998	Petition for writ of certiorari filed. (Response due May 28, 1998)
	Apr 21 1998	Order extending time to file response to petition until May 28, 1998.
	May 28 1998	Brief of respondent Blue Fox, Inc. in opposition filed.
	Jun 1 1998	LODGING consisting of ten copies of lower court argument transcript submitted by counsel for the respondent.
	Jun 9 1998	DISTRIBUTED. June 25, 1998
	Jun 10 1998	Reply brief of petitioner Department of the Army filed.
	Jun 26 1998	Petition GRANTED. SET FOR ARGUMENT December 1, 1998. **********
	Jul 29 1998	Order extending time to file brief of petitioner on the merits until August 21, 1998.
	Aug 10 1998	Record filed.
	Aug 11 1998	Record filed.
	Aug 21 1998	Joint appendix filed.
	Aug 21 1998	Brief of petitioner Department of the Army filed.
	Aug 21 1998	Brief amicus curiae of Surety Association of America filed.
	Sep 9 1998	Order extending time to file brief of respondent on the merits until October 8, 1998.
	Oct 8 1998	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	Oct 8 1998	Brief amicus curiae of American Subcontractors Association filed.
	Oct 8 1998	Brief of respondent Blue Fox, Inc. filed.
	Nov 2 1998	CIRCULATED.
	Nov 10 1998	Reply brief of petitioner Department of the Army filed.
	Dec 1 1998	ARGUED.

Supreme Court, U.S.
FILED

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
PETITIONER

v.

BLUE FOX, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

75pp

QUESTION PRESENTED

The Administrative Procedure Act provides that any person "suffering legal wrong because of agency action" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. As amended in 1976, Section 702 also waives the government's sovereign immunity for such suits that seek relief other than "money damages." Respondent in this case, a subcontractor on a federal project, was not paid the full amount due to it from the prime contractor, and could not collect the full amount due from a surety because the prime contractor had not posted a payment bond required by federal law. The question presented is:

Whether 5 U.S.C. 702 permits respondent to bring an action in federal district court for an "equitable lien" against the government to recover the amounts owed to respondent by the primary contractor.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Army, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 121 F.3d 1357. The opinion of the district court (App., *infra*, 21a-31a) is unreported, but can be found at 1996 WL 293363.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1997. A petition for rehearing was denied on November 7, 1997. App., *infra*, 19a-20a. By orders dated January 27, 1998, and February 26, 1998, Justice O'Connor extended the time within which to file a

petition for a writ of certiorari to and including April 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Administrative Procedure Act, 5 U.S.C. 702, provides in pertinent part as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. * * * Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT

1. As enacted in 1946, Section 10(a) of the Administrative Procedure Act (APA) entitled any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," to judicial review of that action. Act of June 11, 1946, ch. 324, 60 Stat. 243 (codified at 5 U.S.C. 702 (1970)). As originally enacted, however, the APA did not expressly

waive the United States' sovereign immunity. Consequently, for decades the federal courts continued to develop and apply a highly complex—and sometimes unsatisfactory—body of law concerning the application of sovereign immunity to suits challenging agency action. See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4-8 (1976) (1976 House Report); S. Rep. No. 996, 94th Cong., 2d Sess. 4-7 (1976) (1976 Senate Report). As then Assistant Attorney General Antonin Scalia explained to Congress, by the 1970s, "[n]o one c[ould] read the significant Supreme Court cases on sovereign immunity * * * without concluding that the field is a mass of confusion." 1976 House Report at 6; 1976 Senate Report at 5.

In 1970, the Administrative Conference of the United States and the Administrative Law Section of the American Bar Association proposed that Congress simplify judicial challenges to agency action by amending 5 U.S.C. 702 to waive the United States' immunity to suits other than those seeking "money damages." See *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 3 (1970) (introductory comments of Sen. Kennedy). Six years later, the proposal was enacted into law. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721. Thus, 5 U.S.C. 702 in its current form continues to declare that persons suffering legal wrong or aggrieved by agency action within the meaning of a relevant statute are entitled to judicial review thereof. Now, however, it also provides that suits challenging agency action and "seeking relief other than money damages" shall not be dismissed on the ground that the suit is against the United States or that the United States is an indispensable party. See 5 U.S.C. 702.

2. In 1993, petitioner—the United States Department of the Army (Army)—contracted with Verdan Technology, Inc. (Verdan), to install a telephone switching system at an Army depot in Umatilla, Oregon. The final, modified contract price of $432,392.13 included the cost of constructing a facility to house the switching system and installation and testing of the telephone equipment.[1] Verdan, in turn, hired respondent Blue Fox, Inc., as a subcontractor on the project. In return for respondent's agreement to construct a concrete block building to house the telephone system and to install certain safety and support systems, Verdan agreed to pay respondent $186,347.80. App., *infra*, 3a-4a, 21a-22a.

a. Under the Miller Act, 40 U.S.C. 270a *et seq.*, a contractor like Verdan that performs "construction, alteration, or repair of any public building or public work of the United States" generally must post two types of bonds. 40 U.S.C. 270a(a). First, the contractor must post a "performance bond * * * for the protection of the United States" against defaults by the contractor. 40 U.S.C. 270a(a)(1). Second, it must post a "payment bond * * * for the protection of all persons supplying labor and material," 40 U.S.C. 270a(a)(2); the payment bond in effect guarantees payment by the prime contractor to subcontractors and suppliers on the federal project.[2]

b. Although the Army's original solicitation required the contractor to furnish payment and performance bonds if the contract price exceeded $25,000, the Army later treated the contract as a services contract for which no bond was required. App., *infra*, 22a. As a result, the Army's amended solicitation deleted any mention of a bond requirement, and Verdan did not post the Miller Act bonds. *Id.* at 3a, 22a. Respondent asserts that it was unaware that the bonds had not been posted until after it completed performance under its subcontract. *Ibid.*

Verdan paid respondent $139,761.66 of the $186,347.80 owed on its subcontract, leaving $46,586.14 unpaid. App., *infra*, 4a, 22a-23a. Respondent notified the Army that it had not been fully paid. *Id.* at 4a, 23a. After receiving those notices, the Army made two additional disbursements to Verdan, totaling $86,132.33. *Id.* at 4a-5a. The Army later terminated its contract with Verdan for various defaults, including failure to adhere to the contractual delivery schedule. *Id.* at 23a. At the time the Army termi-

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[1] See App., *infra*, 2a-3a, 21a-22a. The contract between the Army and Verdan was a product of Small Business Administration (SBA) efforts through Section 8(a) of the Small Business Act, 15 U.S.C. 637(a). Under that provision, SBA has established a business development program for firms determined to be socially and economically disadvantaged. Through the Section 8(a) program, SBA contracts with government agencies to provide certain services or supplies, and then in turn subcontracts those contracts to eligible firms. App., *infra*, 2a. In this case, the Army awarded the telephone switching contract to SBA, and SBA in turn subcontracted with Verdan. *Id.* at 2a-3a, 21a-22a. SBA, the Army, and Verdan signed a tripartite agreement under which SBA subcontracted with Verdan for performance on the contract, and then delegated responsibility for administering the contract to the Army. *Id.* at 3a. Thus, the Army was responsible for paying the contract amount—$432,392.13—to Verdan, and SBA did not receive any funds in connection with the contract. *Ibid.*

[2] As originally enacted, the Miller Act required that bonds be obtained on contracts exceeding $2,000. Act of Aug. 24, 1935, ch. 642, 49 Stat. 793. In 1978, that figure was increased to $25,000. Act of Nov. 2, 1978, Pub. L. No. 95-585, 92 Stat. 2484. In 1994, after the events underlying this suit took place, the amount was increased to $100,000. Act of Oct. 13, 1994, Pub. L. No. 103-355, Tit. IV, § 4104(b)(1), 108 Stat. 3342.

nated the contract with Verdan, approximately $84,910.52 remained undisbursed on the contract. *Ibid.* That $84,910.52 had been designated for certain installation and testing tasks that were among those that Verdan had failed to complete. *Id.* at 23a.

The Army then modified an existing contract it had with Dynamic Concepts, Inc. (Dynamic), so that Dynamic would complete the Umatilla project. App., *infra*, 5a, 23a. Pursuant to that modification, the Army paid Dynamic $126,772.78. The Army used the undisbursed balance of $84,910.52 from the Verdan contract, plus approximately $42,000 from subsequent fiscal year funds, to pay for completion of the project. *Ibid.*

3. Respondent filed suit against Verdan for breach of contract and, in January of 1995, obtained default judgments against Verdan and its officers. See App., *infra*, 23a-24a. Respondent, however, alleges that it will not be able to collect on its judgment against Verdan. *Id.* at 35a-36a. Accordingly, in May of 1995, respondent filed suit against the Army, seeking to recover from it the $46,586.14 that Verdan owed on the subcontract.[3] Predicating jurisdiction on 28 U.S.C. 1331 and the APA, 5 U.S.C. 702-704, 706, App., *infra*, 34a, respondent sought an "equitable lien" on any funds from the Verdan contract not paid to Verdan, or on any funds available or appropriated for completion of the Umatilla project, and an order

[3] Although respondent also named SBA as a defendant, the district court granted summary judgment in SBA's favor because there was never an identifiable res under SBA's control to which an equitable lien could attach. App., *infra*, 31a. That ruling was affirmed on appeal. *Id.* at 12a-14a; see also *id.* at 5a n.3. Because there are no adverse legal rulings pending against SBA, the United States Department of the Army is the sole petitioner.

directing payment of those funds to it, plus attorney's fees and interest. *Id.* at 39a-40a. Respondent also sought an injunction to prevent the Army from paying any more money on the contract or the follow-on contract with Dynamic until respondent's unpaid bill was satisfied. *Id.* at 40a.[4] Respondent did not move for preliminary relief, however, and the Army eventually paid Dynamics all of the funds remaining from the Verdan contract, plus additional funds, once Dynamics completed its work. *Id.* at 5a n.3, 11a-12a.

4. On May 24, 1996, the district court granted summary judgment in the Army's favor. App., *infra*, 31a. The APA, the court observed, waives the government's immunity only with respect to relief other than money damages. "[T]he question is whether [respondent] seeks money damages for a loss suffered, or whether [respondent] seeks funds to which it is entitled by statute." *Id.* at 28a. Respondent premised its suit on the allegation that the Army had erred or acted unlawfully in failing to require Verdan to post a Miller Act bond. *Ibid.* But even if the Miller Act required that a bond be posted, the district court reasoned, the "Army had no contractual obligation or statutory obligation to pay [respondent]. The Miller Act neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract." *Id.* at 29a. As a result, the relief respondent was seeking did not constitute enforcement of a statutory obligation. Instead, the court concluded, it constituted an award of the "money damages [respondent] suffered

[4] In the alternative, respondent sought an injunction ordering the Army to pay $46,586.14 to SBA, App., *infra*, 39a, presumably on the theory that SBA would in turn pay the money to respondent. See note 1, *supra*.

when Verdan failed to pay [respondent] in full," and "[t]he waiver of sovereign immunity provided by the APA does not apply to the claim of [respondent] against the Army." *Id.* at 30a.

5. a. Respondent appealed and a divided panel of the Ninth Circuit reversed in relevant part. App., *infra*, 1a-18a. The majority acknowledged that the APA could provide the necessary waiver of sovereign immunity only if respondent sought relief other than money damages. *Id.* at 6a. Nonetheless, relying on the distinction between money damages and specific relief set forth in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), the majority concluded that the monetary relief respondent sought constituted specific relief and not money damages. According to the Ninth Circuit:

> Here, [respondent] seeks an equitable lien only for the very thing to which it is entitled under the contract. [Respondent] does not seek any consequential damages to compensate losses suffered beyond the contract price. Therefore, the district court had jurisdiction to consider its claim under the APA.

App., *infra*, 7a.

Expanding on that analysis, the court of appeals analyzed the issue before it in two steps. First, turning to the scope of the waiver of immunity in Section 702, the court read *Bowen* as holding that Section 702 waives the United States' immunity against actions for "specific relief," which the court read as synonymous with "equitable relief." See App., *infra*, 8a ("[T]he APA waives immunity for equitable actions."); see also *id.* at 10a ("Any equitable rights held by subcontractors as against [the government entity] which may have been unenforceable where sovereign

immunity existed, became enforceable upon immunity being waived."). Second, the court examined whether a claim for an equitable lien constituted "equitable relief." *Id.* at 9a-11a. Based on its understanding of the nature of equitable liens, the court of appeals concluded that "equitable liens are properly characterized as equitable remedies." *Id.* at 10a.

Because it concluded that Section 702 waives the United States' immunity for all equitable actions, and that a claim to an equitable lien is an equitable action, the court of appeals held that a suit for an equitable lien falls within the scope of the waiver of immunity in Section 702. As the court of appeals described its holding: "Since the APA waives immunity for equitable actions, the district court had jurisdiction under the APA" to consider a claim for an equitable lien. App., *infra*, 8a; see *id.* at 10a ("[S]uch equitable liens are properly characterized as equitable remedies, rather than money damages."); *id.* at 1a ("[W]e hold that the Administrative Procedure Act permits [an] equitable lien claim against the Army because an action for specific performance for the payment of money is not an action for money damages.").

The court of appeals also rejected the district court's conclusion that a monetary remedy could be available as "specific relief" only where the plaintiff seeks to enforce a statutory right to payment. App., *infra*, 7a-8a. Citing *Aetna Casualty & Surety Co.* v. *United States*, 71 F.3d 475 (2d Cir. 1995), the court held that "there is no requirement in *Bowen* or the APA that the specific relief requested be statutorily granted. That is, a party need not rely upon a statute in order to obtain federal court jurisdiction [over a claim for monetary relief] under the APA." App., *infra*, 8a.

b. Judge Rymer dissented. App., *infra*, 14a-18a. "Never before," she observed, "has a court held that a subcontractor may sue an agency of the United States, which has not agreed to be sued, for contract monies that the prime contractor should have paid to the subcontractor but didn't." *Id.* at 14a. For decades, she pointed out, courts had uniformly rejected subcontractor claims against the government. *Ibid.* "[N]o matter how you slice [respondent's] claim," she explained, "it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond," and "the law is well settled that this may not be done unless the contracting agency has agreed to be sued." *Id.* at 14a-15a.

Congress, Judge Rymer further explained, had chosen to protect subcontractors through the Miller Act by requiring prime contractors to post payment bonds. App., *infra*, 15a. But where such bonds were not posted, she noted, "neither the Federal Tort Claims Act, the Miller Act, nor the Tucker Act, waives sovereign immunity to permit a subcontractor to sue the United States directly in its own right for monies the subcontractor should have received, but did not receive, from the prime contractor." *Ibid.*

Turning to the majority's conclusion that the APA waived immunity for equitable actions, Judge Rymer explained that, "in the absence of an agency waiver, subcontractors cannot achieve 'by indirection a result that they could not reach directly under the Miller Act.'" App., *infra*, 16a (citation omitted). "Unlike the majority," she observed, "I don't think it matters that the right asserted is *equitable*." *Id.* at 17a. What matters, she continued, is that the waiver contained in Section 702 of the APA can be applied only if "the government has a duty which can be specifically enforced." *Id.* at 16a. In this case, the government

"has none." *Ibid.* Although the Army should not have approved the Verdan contract without Verdan's posting of an adequate surety bond—and the absence of the bond is what "caused [respondent's] loss"—requiring the Army to pay money to respondent was simply one way of giving respondent the "money damages" remedy that the APA proscribes. *Id.* at 16a-17a.

REASONS FOR GRANTING THE PETITION

The court of appeals' conclusion that the APA waives the government's sovereign immunity for a subcontractor's claim for monies that a federal contractor should have paid, but did not pay, is unprecedented. The Ninth Circuit's decision misconstrues the language of 5 U.S.C. 702 and misreads this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), in a manner that conflicts with the decisions of the District of Columbia Circuit in *Hubbard* v. *Administrator, EPA*, 982 F.2d 531 (1992) (en banc), and the Third Circuit in *Dia Navigational Co.* v. *Pomeroy*, 34 F.3d 1255 (1994). The decision below also has substantial adverse consequences for the United States. Broadly construed, it erroneously allows the APA to be used to justify monetary recovery against the government for tort-type or contract-type injuries whenever the requested remedy can be labeled "equitable." And it essentially nullifies longstanding precedents that have refused to allow unpaid subcontractors to recover from the government sums owed by their contractors.

A. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Moreover, when the government does consent to be sued, "the

terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), and such a waiver must be strictly construed, *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).

The APA, in 5 U.S.C. 702, provides a limited waiver of sovereign immunity. It entitles parties to "judicial review" of "agency action" if the action causes them "legal wrong," or "adversely affect[s]" or "aggrieve[s]" them "within the meaning of a relevant statute." And it waives the government's immunity to such a suit if the suit seeks relief "other than money damages." 5 U.S.C. 702.[5]

1. In *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), this Court considered the meaning of the phrase "money damages" in Section 702. There, the Secretary of Health and Human Services had issued a final order refusing to reimburse the State of Massachusetts for certain expenses under its Medicaid Program, and the State brought suit seeking to "set aside" that order. Rejecting the United States' contention that the State's suit was for "money damages," the Court explained that suits for "money damages" stand in contradistinction to suits which are in the nature of "an equitable action for specific relief." 487 U.S. at 893; see also *id.* at 897 (legislative history shows that phrase "money damages" was used

[5] Section 702 also provides additional exceptions to the waiver. For example, it provides that "[n]othing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." See note 16, *infra*. Further, 5 U.S.C. 704 provides for review under the APA only when no other statute provides a plaintiff with an adequate remedy. See *e.g.*, *Mitchell* v. *United States*, 930 F.2d 893, 896-897 (Fed. Cir. 1991).

in common law sense, as distinct from specific relief). The former provides the "victim with monetary compensation for an injury to his person, property, or reputation," while the latter merely forces the defendant to undertake action, such as the return of property to which the plaintiff is entitled. *Id.* at 893.

"The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen*, 487 U.S. at 893. As the Court observed:

> The term "money damages," 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled."

Id. at 895 (quoting *Maryland Dep't of Human Resources* v. *Department of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.) (quoting in turn D. Dobbs, *Handbook on the Law of Remedies* 135 (1973))).

Applying that analysis, the Court in *Bowen* held that Massachusetts' suit was not for "money damages." Because Massachusetts' suit was brought "to enforce * * * the Medicaid Act, which provides that the Secretary 'shall pay' certain amounts for appropriate Medicaid services," it was "not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900.

2. The D.C. Circuit has construed *Bowen* to require plaintiffs seeking monetary relief under the APA to show not merely that the relief they seek can be deemed "equitable," but that Congress expressed a clear intent to award them the funds to which they claim an entitlement. See *Hubbard* v. *Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc); see also P. Strauss et al., *Gellhorn and Byse's Administrative Law: Cases and Comments* 1112 (9th ed. 1995) (*Bowen* "has itself been narrowly interpreted by the courts of appeals, particularly the D.C. Circuit," citing *Hubbard*). Thus, in *Hubbard* the D.C. Circuit held that "back pay" is not available in an APA suit challenging an agency decision to deny the plaintiff employment. Rejecting analysis indistinguishable from that employed by the Ninth Circuit below, the D.C. Circuit declared that "[w]hat may qualify as an 'equitable remedy' * * * is not synonymous with specific relief." 982 F.2d at 537; see *ibid.* ("[T]he fact that cases in many contexts attach the 'equitable' label to back pay in no way contradicts the basic conclusion that back pay is still essentially a compensatory device."); see also *id.* at 539 (Randolph, J., joined by R.B. Ginsburg, J., concurring) ("[T]he line section 702 draws is not between actions at law and suits in equity.").

Instead, the D.C. Circuit held, monetary relief can be considered "specific relief" only if it gives the plaintiff the very thing to which he would otherwise be entitled from the government. 982 F.2d at 537 (relief is "specific" if it gives the plaintiff "the thing to which he was entitled"); *id.* at 538 ("Whether we or someone else call a remedy restitutionary, equitable or anything else, it fits within § 702's waiver only if it gives the plaintiff the specific thing to which he was originally entitled."). Noting the absence of any

statute entitling the plaintiff to compensation from the government for the time during which he was not a government employee—even if the act of denying him a job was wrongful—the D.C. Circuit declared that "*Bowen*'s holding * * * does nothing for [plaintiff's] cause. [Plaintiff's] basic claim is not for enforcement of any legal mandate that the EPA pay him a sum of money; rather, it is to force the EPA to offer him the job it denied him." *Id.* at 536.

The Third Circuit in *Dia Navigational Co.* v. *Pomeroy*, 34 F.3d 1255 (1994), adopted a similar interpretation of *Bowen*. Rejecting the plaintiff's claim that it was entitled to monetary relief despite the absence of a statutory entitlement, the court of appeals explained that "[t]he crucial distinction" between a suit for specific relief and one for money damages is that the former "seek[s] funds to which a statute allegedly entitles" the plaintiff, while the latter demands "'money for the losses . . . suffered by virtue of' the agency's failure to do that which it was required to do." *Id.* at at 1267 (quoting *Bowen*, 487 U.S. at 901). Thus, in *Dia* itself, the Third Circuit upheld the plaintiff's right to seek an injunction against an allegedly unlawful INS policy, but held that any claim for recovery of costs incurred as a result of that policy was barred by sovereign immunity. Explaining why the entire suit could not be characterized as one for specific relief, the court of appeals observed:

> [T]here is no statutory entitlement to these funds. Instead, Congress has explicitly given the INS the authority to promulgate regulations as it deems necessary * * * . As we view this case, the wrong that [plaintiff] has suffered is not the denial of money to which [the statute] entitles it,

> but rather the INS's failure to follow the appropriate procedures in implementing [the statute]. An award of money in these circumstances could only be characterized as a substitute for what ought to have been done, and therefore would constitute money damages. As such, [plaintiff's] claim is barred by the doctrine of sovereign immunity.

34 F.3d at 1267.

The Ninth Circuit here, in conflict with *Dia* and *Hubbard*, erroneously interpreted Section 702 and *Bowen* as declaring that the United States lacks sovereign immunity from any suit seeking "equitable" rather than "legal" relief. See App., *infra*, 8a-9a, 10a; pages 8-9, *supra*.[6] The Ninth Circuit further held that monetary relief can be considered specific relief—and thus not money damages—even if not based on a statute that mandates the money payment. App., *infra*, 8a ("there is no requirement in *Bowen* or the APA" that the right to the money "be statutorily granted").[7] *Dia* and *Hubbard* are both to the

[6] The Ninth Circuit's reasoning is, by contrast, indistinguishable from that adopted by the dissenting opinion in *Hubbard*. See 982 F.2d at 548 (Edwards, J., dissenting) ("Our conclusion that a back pay award to Hubbard would constitute equitable relief largely disposes of any question regarding sovereign immunity.").

[7] The court of appeals below relied upon *Aetna Casualty & Surety Co.* v. *United States*, 71 F.3d 475 (2d Cir. 1995), as support for this holding. App., *infra*, 8a. In *Aetna*, a surety sought damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for the government's failure to offset, for the surety's benefit, a special tax refund the government owed to the surety's principal. The district court concluded it lacked jurisdiction and refused to allow the surety to amend its complaint to assert an APA claim. The Second

contrary. See *Dia*, 34 F.3d at 1267 (claim is for specific relief rather than money damages if it "seek[s] funds to which a statute allegedly entitles" the plaintiff); *Hubbard*, 982 F.2d at 536 (rejecting plaintiff's claim for back pay because his "basic claim is not for enforcement of any legal mandate that the EPA pay him a sum of money").[8]

Circuit affirmed the dismissal, holding that the claim was barred by the FTCA's exception for claims arising in respect of the assessment or collection of taxes, 28 U.S.C. 2680(c). It reversed the district court's denial of the motion to amend, however, reasoning that since the surety sought an injunction to force the government to perform an asserted legal obligation, the claim was not precluded by the APA's bar to claims for money damages. 71 F.3d at 479. It also refused to limit the holding of *Bowen* to cases where the duty to pay arises from a statute. *Ibid.* The case returned to district court, and we have been informed that proceedings there have been stayed pending the outcome of related bankruptcy proceedings.

[8] The Ninth Circuit's decision below also conflicts with the D.C. Circuit's decision in *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (1994). The Ninth Circuit held that the government is liable to respondent even though the funds for which respondent sought an equitable lien already had been spent. See App., *infra*, 11a-12a ("The fact that the Army has since paid out the monies to which the lien attached does not thwart [respondent's] equitable lien claim. * * * The Army cannot escape [respondent's] equitable lien by wrongly paying out funds to the prime contractor when it had notice of [respondent's] unpaid claims."). In *City of Houston*, in contrast, the D.C. Circuit held that once the *specific funds* sought by the plaintiff had been spent, obligated, or otherwise exhausted, an award of money from any other source would constitute a prohibited award of money damages. "Section 702 permits monetary awards only when, as in *Bowen*, such an award constitutes *specific relief*—that is, when a court orders a defendant to pay a sum owed out of a specific *res*. * * * An award of monetary relief from any source of funds [other than the *res* to which the plaintiff claims entitlement] would consti-

3. The D.C. Circuit's and Third Circuit's reading of *Bowen* and 5 U.S.C. 702 is consistent with Section 702's terms and this Court's precedents.

a. In *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 432 (1990), this Court reiterated that "funds may be paid out [of the Treasury] only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute."[9] That principle (which is so often articulated in the context of the Tucker Act, 28 U.S.C. 1491, see *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976)) has frequently been applied to bar suits for a money judgment in the absence of a specific statutory provision providing for payment. See *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (agency's sue-and-be-sued clause does not, in and of itself, allow a claim for money without an entitlement from a source of substantive law); see also *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) (Appropriations Clause and Section 702's ban on actions for "money damages" collectively bar suits for monies obligated to other grantees or for which the appropriation has expired).

The interpretation of Section 702 and *Bowen* adopted by the D.C. and Third Circuits properly respects this longstanding rule. Simply put, before the courts may order the payment of funds from the Treasury as specific relief under the APA, they

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tute money damages rather than specific relief, and so would not be authorized by APA Section 702." 24 F.3d at 1428.

[9] The Court explained that the purpose of the Appropriations Clause, Art. I, § 9, Cl. 7, is to "assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 495 U.S. at 428.

must—as in all other contexts—locate an Act of Congress entitling the plaintiff to that relief. That principle is consistent with *Bowen*, which held that relief was available under the APA only because the relief "enforce[d] [a] statutory mandate * * * which happen[ed] to be one for the payment of money." 487 U.S. at 900; see also 1976 Senate Report at 19 ("The committee does not believe that enactment of [the proposed waiver of immunity in Section 702], which is procedural in nature and clarifies the jurisdiction of Federal courts while marginally expanding it, will require additional appropriation of funds to either the judiciary or the agencies.").

The Ninth Circuit's decision thus cannot be reconciled with the fundamental principle that the courts may order the payment of funds from the Treasury only on the basis of an Act of Congress entitling the plaintiff to those funds. Without appropriate attention to the scope of the waiver provided by Section 702, the Ninth Circuit below required the payment of funds from the Treasury to respondent based on its own view of appropriate principles of equity, regardless of whether Congress has, by law, provided for such a payment. Nothing in 5 U.S.C. 702 or *Bowen* authorizes such a dramatic expansion of access to the federal fisc.

b. The Ninth Circuit's decision also misapplies the distinction between "money damages" and "specific relief" set forth in *Bowen*. Under *Bowen*, the money damages awards that the APA prohibits are those awards "given to the plaintiff to *substitute* for a suffered loss"; in contrast, the "specific remedies" permitted by the APA "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." 487 U.S. at 895.

Here, an equitable lien against government funds constitutes a "substitute for a suffered loss" rather than "specific relief" in the form of the "very thing to which [respondent] was entitled." Although the Ninth Circuit majority did not identify the "agency action" that allegedly caused respondent to suffer "legal wrong" or "adversely affected" respondent within the meaning of a relevant statute, 5 U.S.C. 702—and therefore did not even identify what agency action was being subjected to judicial review—the one government action it did identify was the Army's failure to require the posting of a payment bond that would have protected respondent from Verdan's default. But if requiring the posting of a bond is the duty the Army allegedly breached, the lien respondent seeks cannot be "specific relief"—and must be money damages—because it does not give respondent "the very thing to which [it] was entitled," *i.e.*, a bond from a qualified surety. Instead, the relief respondent seeks would provide a "substitute" remedy for that bond—that is, money damages—in the form of payment from the government. As the dissent below observed, "no matter how you slice [respondent]'s claim, it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond." App., *infra*, 14a (Rymer, J., dissenting). Respondent can identify no statute that entitles it to payment from the government in such circumstances. Because the government had no money-payment "duty which can be specifically enforced," respondent's suit for a monetary award was not a suit seeking "specific relief." *Id.* at 16a (Rymer, J. dissenting).

The Ninth Circuit's contrary conclusion does not withstand scrutiny. According to the majority, "[respondent] seeks an equitable lien only for the very

thing to which it is entitled under the contract," *i.e.*, payment on its contract. App., *infra*, 7a. But the contract to which the Ninth Circuit refers was between respondent and Verdan, and thus entitled respondent to payment from Verdan, not from the government. See *Merritt* v. *United States*, 267 U.S. 338 (1925) (no claim against the United States under contract absent privity between United States and plaintiff).[10] By requiring the government to pay when respondent was entitled to payment only from Verdan, the Ninth Circuit provided precisely the sort of "substitute" remedy barred as money damages under the APA.[11]

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[10] Even if respondent did have a contractual relationship with petitioner, respondent still would not be able to obtain the relief it seeks under the APA. It is well established that claims for equitable relief based upon a contract are not cognizable under the APA because such relief is "impliedly forbid[den]" by the Tucker Act, and therefore barred by the final sentence of 5 U.S.C. 702. 1976 House Report at 13; see, *e.g.*, *North Star Alaska Hous. Corp.* v. *United States*, 9 F.3d 1430, 1432 (1993) (en banc) (APA does not afford district courts jurisdiction over equitable claims against the government based on contract rights, as opposed to statutory rights), on remand, 14 F.3d 36 (9th Cir.), cert. denied, 512 U.S. 1220 (1994); *Zelman* v. *Gregg*, 16 F.3d 445, 448 (1st Cir. 1994) ("equitable relief cannot be obtained on contract claims against the government"); *Eagle-Picher Indus., Inc.* v. *United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (APA's waiver of sovereign immunity "does not extend to actions founded upon a contract with the United States"); *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990) (effort to obtain specific performance of promise allegedly made by an agency not within district court's jurisdiction); *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.) ("The sole remedy for an alleged breach of contract by the federal government is a claim for money damages.").

[11] The cases upon which the Ninth Circuit relied do not support the proposition that respondent's claim is within the

4. That respondent does not have an enforceable right to payment against the government is particularly clear in the present context. As the district court recognized, this case arises from the prime contractor's failure to post the payment bond required by the Miller Act. The Miller Act, however, does not give subcontractors any rights against the government. To the contrary, the plain terms of the Miller Act impose "no affirmative obligations on the government," *Arvanis* v. *Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1288 (7th Cir. 1984), cert. denied, 469 U.S. 1191 (1985); the only obligations it creates are imposed on the prime contractor.

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scope of the APA's waiver of immunity. For example, in neither *Pearlman* v. *Reliance Insurance Co.*, 371 U.S. 132 (1962), nor *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U.S. 404 (1908), was the United States a defendant, so the issue of sovereign immunity did not arise. The United States had agreed to part with the funds, and the Court was asked to decide only which private litigant had a superior entitlement. The remaining cases cited by the court of appeals, *Wright* v. *United States Postal Service*, 29 F.3d 1426 (9th Cir. 1994); *Kennedy Electric Co.* v. *United States Postal Service*, 508 F.2d 954 (10th Cir. 1974); and *Active Fire Sprinkler Corp.* v. *United States Postal Service*, 811 F.2d 747 (2d Cir. 1987), involved suits against the United States Postal Service pursuant to the Postal Service's sue-and-be-sued clause, 39 U.S.C. 401(1). Unlike the waiver in 5 U.S.C. 702, the waiver in Section 401(1) is not limited by the nature of the relief sought; accordingly, whether or not the relief sought in those cases constituted "money damages" was irrelevant. In any event, both *Active Fire Sprinkler* and *Wright* are inconsistent with the decision below, as they recognize the general rule that unpaid subcontractors cannot sue the government directly for the sums that their contractors should have, but did not, pay them. See *Active Fire Sprinkler*, 811 F.2d at 754 & n.6; *Wright*, 29 F.3d at 1430-1431.

The history of the Miller Act makes that clear as well. For more than a century, Congress and the courts had recognized that subcontractors have no enforceable rights against the government and cannot obtain workers' or materialmen's liens on federal property if they are not paid.[12] As this Court declared in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947), "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation."

To provide relief from the harsh effects of that rule without sacrificing the government's immunity to suit, Congress in 1894 enacted the Heard Act, ch. 280, § 1, 28 Stat. 278.[13] Under the Heard Act, any person entering into a formal contract with the United States for the construction or repair of a public building or public works was required to execute the "usual penal bond, with good and sufficient sureties,"

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[12] See, *e.g.*, *Hill* v. *American Surety Co.*, 200 U.S. 197, 203 (1906) ("As against the United States, no lien can be provided upon its public buildings or grounds."); *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20, 21 (1845) (money retained by the government for the benefit of its employees may not be reached by employees' creditors unless Congress specifically authorizes it); see also H.R. Rep. No. 97, 53d Cong., 1st Sess. (1893) (finding that "there is no law now in existence for the protection of mechanics and material-men in this class of cases, as it is contrary to allow mechanics' or material-men's liens on public buildings or public works").

[13] *Hill*, 200 U.S. at 203 (The Heard Act was passed to mitigate the rule against creating liens on public property and "substitute[s] the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual."). Accord *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910); *Equitable Surety Co.* v. *McMillan*, 234 U.S. 448, 455 (1914); *J.W. Bateson Co.* v. *United States*, 434 U.S. 586, 589 (1978).

and to "promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." *Ibid.* An unpaid subcontractor was authorized to "bring suit in the name of the United States for his or their use and benefit against said contractor and sureties * * * *Provided*, [t]hat such action and its prosecutions shall involve the United States in no expense." *Ibid.*

In 1935, Congress repealed the Heard Act and replaced it with the Miller Act, ch. 642, 49 Stat. 793, 40 U.S.C. 270a *et seq.* The Miller Act, like the Heard Act, requires contractors on specified federal contracts to post a payment bond to protect subcontractors. 40 U.S.C. 270a(a). And the Miller Act, also like the Heard Act, affords unpaid subcontractors the right to sue on the payment bond "in the name of the United States for the use of the person suing," 40 U.S.C. 270b(b), without creating any rights in the subcontractor vis-à-vis the government. Indeed, Section 270b(b) expressly states that "[t]he United States shall not be liable for the payment of any costs or expenses of any such suit." While Congress has amended the Miller Act periodically, and has authorized specific agencies to waive Miller Act requirements under certain circumstances, see *e.g.*, Act of Apr. 29, 1941, ch. 81, 55 Stat. 147; Act of June 3, 1955, Pub. L. No. 60, 69 Stat. 83; Act of Nov. 2, 1966, Pub. L. No. 89-719, Tit. I, § 105, 80 Stat. 1139; Act of Nov. 2, 1978, Pub. L. No. 95-585, 92 Stat. 2484; Act of Oct. 13, 1994, Pub. L. No. 103-355, Tit. IV, § 4104(b)(2), 108 Stat. 3342, Congress has never altered the settled rule that subcontractors do not have enforceable rights against the United States for funds that their contractors failed to pay them.

In light of the plain terms and history of the Miller Act, courts of appeals have universally rejected attempts by unpaid subcontractors to seek recovery from the government, whether those claims were asserted under the FTCA,[14] the Tucker Act,[15] or general equitable principles. Thus, in *Automatic Sprinkler Corp. of America* v. *Darla Environmental Specialists*, 53 F.3d 181 (7th Cir. 1995), an unpaid subcontractor brought an action against the United States to recover monies that the government had retained on a contract with the dissolved contractor. Rejecting the claim on sovereign immunity grounds, the Seventh Circuit held:

> The principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief. * * *

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[14] See *Hardaway Co.* v. *United States Army Corps of Eng'rs*, 980 F.2d 1415 (11th Cir.), cert. denied, 510 U.S. 820 (1993) (no FTCA claim by subcontractor for government's alleged negligent failure to investigate assets of surety); *Westbay Steel, Inc.* v. *United States*, 970 F.2d 648 (9th Cir. 1992) (no FTCA claim for negligent approval of bond sureties and no jurisdiction under FTCA to award an equitable lien); *Arvanis*, 739 F.2d at 1292 (rejecting FTCA claim based on government's failure to require Miller Act bond as attempt "to achieve by indirection a result that [subcontractors] could not reach directly under the Miller Act"); *McMann* v. *Northern Pueblos Enters., Inc.*, 594 F.2d 784, 785-786 (10th Cir. 1979) (same); *Devlin Lumber & Supply Corp.* v. *United States*, 488 F.2d 88, 89 (4th Cir. 1973) (per curiam) (same); *United States* v. *Smith*, 324 F.2d 622, 624-625 (5th Cir. 1963) (same).

[15] See *United Elec. Corp.* v. *United States*, 647 F.2d 1082, 1084 (Ct. Cl.) (subcontractors without contractual relationship with government cannot sue under Tucker Act, and Miller Act is not money-mandating statute for Tucker Act purposes), cert. denied, 454 U.S. 863 (1981).

> Automatic Sprinkler has not pointed to such a statute; none exists.

Id. at 182. Summarizing the relevant law, the court explained that "'when a prime contractor on a federal construction project fails to obtain a Miller Act payment bond and then defaults without paying his subcontractors . . . the hapless subcontractor, not the United States,' is left holding the bag." *Id.* at 182 (quoting *Arvanis*, 739 F.2d at 1288); see also *ibid.* ("Subcontractors must look exclusively to the general contractors (and the bonds) for payment. They cannot obtain liens on the federal projects and buildings, and they cannot collect directly from the Treasury.").

The Ninth Circuit's decision in this case—which holds that subcontractors may, under the APA, seek compensation from the government for funds owed to the subcontractor by the prime contractor—cannot be reconciled with this otherwise clear and uniform body of law. App., *infra*, 14a (Rymer, J., dissenting) ("Never before has a court held that a subcontractor may sue an agency of the United States, which has not agreed to be sued, for contract monies that the prime contractor should have paid to the subcontractor but didn't."). Nor can it be reconciled with the purpose of the APA, which was to leave in place limitations on monetary recovery against the United States. See 1976 House Report at 11 ("limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes [are to be] unaffected" by the waiver of immunity provided in Section 702); 1976 Senate Report at 19 (waiver of immunity is "procedural in

nature" and thus will not "require additional appropriation of funds to either the judiciary or the agencies.").[16]

B. The decision below not only conflicts with decisions of this Court and other courts of appeals; it also raises questions of substantial importance because it affords plaintiffs a new category of previously unavailable monetary relief against the government. If plaintiffs need show only that the relief they seek—be it quantum meruit, restitution, or whatever—is usually considered "equitable" in order to bring suit

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[16] Section 702 does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 286 n. 22 (1983). The "implied" preclusion provided by Section 702 extends to "all statutes which grant consent to suit and prescribe particular remedies." 1976 House Report at 13. As then Assistant Attorney General Antonin Scalia explained to Congress before it enacted the waiver of immunity now contained in Section 702: "Because existing statutes have been enacted against the backdrop of sovereign immunity, [Section 702's exclusion of actions where another statute 'impliedly forbid[s]' them] will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 105 (1976). Here, Congress enacted the Miller Act against the backdrop of sovereign immunity. And it created an alternative remedy to suit against the government, consenting to suit by unpaid subcontractors in the name of the United States against the payment bond posted by the defaulting contractor. Under these circumstances, the remedy created by the Miller Act is "exclusive," and the attempt to create an alternative remedy against the government through the APA is "impliedly forbid[den]" within the meaning of Section 702.

for money under the APA, the APA will be used to remedy tort-type injuries in circumstances in which the FTCA itself limits relief, or contract-type remedies in circumstances where the Tucker Act does as well. In the instant case, *Hubbard*, and *Dia*, the plaintiffs attempted to invoke this Court's decision in *Bowen* to seek funds previously unavailable from the government. In contrast, *Bowen* itself concerned only which court should hear the statutory entitlement claim, and created no new entitlement to money. See, *e.g.*, U.S. Br. at 38-46, *Bowen* v. *Massachusetts*, No. 87-712; see also *id.* at 34-35. The D.C. Circuit in *Hubbard* and the Third Circuit in *Dia*—in conflict with the Ninth Circuit's decision below—properly rejected the plaintiffs' attempts to impose new monetary liability on the federal government under the APA.

Moreover, in the specific context of subcontractors on government projects, the decision below has significant adverse consequences for the government. It essentially nullifies longstanding precedent that previously refused to allow unpaid subcontractors to recover from the government, under the Miller Act, the FTCA, or the Tucker Act, the sums that their contractors owed, but did not pay, them. As this case makes clear, even where the project money has all been paid out, government agencies now for the first time must be concerned with whether new money will have to be found to pay unpaid subcontractors. Such an unprecedented—and unpredictable—financial burden on the United States Treasury in the absence of an Act of Congress consenting to such relief is fundamentally inconsistent with the Appropriations Clause of the Constitution and the statutory framework that has long governed government contracting

and subcontracting. Review by this Court therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

APRIL 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35648

BLUE FOX INC., A WASHINGTON CORPORATION, PLAINTIFF-APPELLANT

v.

SMALL BUSINESS ADMINISTRATION; THE UNITED STATES ARMY, DEFENDANTS-APPELLEES

Argued and Submitted: July 10, 1997
Decided: Aug. 25, 1997

Before: FERGUSON, REINHARDT, and RYMER, Circuit Judges.

FERGUSON, Circuit Judge:

Blue Fox appeals from a summary judgment in favor of the Small Business Administration and the Department of the Army. Blue Fox was a subcontractor which worked on a construction project at an Army Depot. After the prime contractor failed to pay Blue Fox in full, Blue Fox sought an equitable lien against funds held by the Army and Small Business Administration which has since been distributed to the prime contractor. Contrary to the district court, we hold that the Administrative Procedure Act permits Blue Fox's equitable lien claim against the Army because an action for specific performance for the payment of money is not an action for money damages. We affirm the district court's decision that

a lien cannot be enforced against the Small Business Administration because that agency never possessed nor controlled the contract fund.

I. FACTUAL BACKGROUND

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), established a business development program for firms deemed to be socially and economically disadvantaged. The purpose of the 8(a) program is to help small businesses owned and controlled by socially and economically disadvantaged individuals and economically disadvantaged Indian tribes "to compete on an equal basis in the mainstream of the American economy." 13 C.F.R. § 124.1(a). This is accomplished by setting aside certain government procurement contracts to be awarded by the Administrator of the SBA to firms determined by the SBA to be socially and economically disadvantaged. The Small Business Act also authorizes SBA to provide financial assistance to support such small business concerns with regard to costs and technical and management assistance. 13 C.F.R. § 124.1(b).

In September, 1993, pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), the United States Department of the Army awarded a contract to the United States Small Business Administration. The contract involved the installation and testing of a telephone switching system and the construction of a facility to house the switching system at the Umatilla Army Depot, Oregon. SBA agreed to furnish the supplies and services requested by the Army by subcontracting with Verdan Technology, Inc.

The Army, SBA, and Verdan then signed a tripartite agreement. Under the terms of the contract, SBA

delegated responsibility for administering the contract back to the Army. Thus, Verdan was to be paid directly by the Army. The SBA did not receive any funds in connection with the contract, the total amount of which was $432,392.13.

The original solicitation issued by the Army required the contractor to furnish payment and performance bonds if the contract exceeded $25,000. However, the Army later amended the solicitation, deleting the bond requirements. Defendants now concede that the Verdan contract was subject to the Miller Act, 40 U.S.C. §§ 270a-270d.[1] However, SBA did not grant an exemption to Verdan from Miller Act bond requirements under 13 C.F.R. § 124.305 (1990), which enumerated requirements concerning SBA control of contract funds and notice to subcontractors in the event that SBA granted an exemption to the Miller Act bond requirement.[2]

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[1] The Miller Act provides that before any contract exceeding $25,000 for the construction, alteration, or repair of any public building or public work of the United States is awarded to a contractor, that contractor shall furnish both a payment bond and a performance bond "for the protection of the United States." 40 U.S.C. § 270a. The purpose of the Act "is to protect those who would have materialmen's and workmen's liens under state law if they were not working on a structure exempt as a federal public work or building." *United Bonding Ins. Co. v. Catalytic Constr. Co.*, 533 F.2d 469, 473 (9th Cir. 1976).

[2] 13 C.F.R. § 124.305 (1990) outlined the conditions upon which the SBA could exempt an 8(a) participant from any payment and performance bonds required by the Miller Act. Subsection (d) of that section lists several precautions that were to be taken to secure payment to subcontractors. For example:

Verdan entered into a subcontract with Blue Fox, Inc., whereby Blue Fox agreed to construct a concrete block building to house the switching system and install several other specific items of the contract. The total cost of the work to be performed by Blue Fox was $186,347.80.

Blue Fox did not know until it had completed its performance under the contract that Verdan had not furnished a payment or performance bond. Verdan failed to pay Blue Fox its full contract price—the sum of $46,586.14 remained due. Blue Fox informed the Army and SBA in writing on May 26, 1994, and again on June 15, 1994, that it had not been fully paid. The Army disbursed a total of $86,132.33 to Verdan between July 5, 1994 and October 11, 1994.

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(2) There must be established a special bank account in an institution insured by the Federal Deposit Insurance Corporation (FDIC), into which the procuring agency will deposit all payments relating to the performance of the contract, or, in the alternative, the procuring agency, at its option, shall provide for direct disbursement of contract proceeds to suppliers, subcontractors, laborers and others.

(3) All disbursements from any special bank account established shall be subject to the approval and counter signature by SBA. . . .

(4) The 8(a) contractor must notify persons supplying it with materials or labor in writing that the contract is exempt from the Miller Act's bonding requirements and must also notify such suppliers in writing that SBA will not be liable for payment for materials or labor. The 8(a) contractor must obtain a written acknowledgment . . . and such acknowledgment(s) must be in SBA's possession prior to award of the contract where practicable, and, in all instances prior to payment of invoices.

On January 3, 1995, the Army terminated the contract for default because Verdan failed to adhere to the contract's delivery schedule and to submit required contractor Data Requirement Lists. In its notice of intention to terminate the contract, the Army indicated that one of its "most severe items of concern" was Verdan's failure to pay Blue Fox.

After the termination of the Verdan contract, the Army chose Dynamic Concepts, Inc. to finish the uncompleted portion of the work, under an existing contract between the Army and Dynamic. This contract did not include the SBA as a party. The modification contract with Dynamic was for $126,772.78 and was partially funded with the undisbursed balance on the Verdan contract, $84,910.52.[3]

Blue Fox obtained a default judgment in the Tribal Court of the Yakima Indian Nation against Verdan and its officers. Blue Fox asserts that it is unlikely to collect on these judgments because existing liens against Verdan precede Blue Fox's judgment and the judgment exceeds the officers' individual net worths.

In this litigation, the district court denied Plaintiff's motion for summary judgment and granted Defendant's motion for summary judgment. The court held that it did not have jurisdiction over Blue

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[3] The Army did not authorize payment to Dynamic for its work in completing the project until July 27, 1995, two months after Blue Fox filed this action in district court, asking *inter alia*, that the court enjoin Defendants from paying any further moneys or making any payments from funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project, until Plaintiff's unpaid bill is satisfied.

Fox's claim against the Army because the Administrative Procedure Act did not constitute a waiver of sovereign immunity in this case. Additionally, the court held that it could not grant an equitable lien against SBA because there had been no *res* in SBA's possession and control to which an equitable lien could attach.

II. DISCUSSION

We review questions involving principles of sovereign immunity *de novo*. *United States v. Woodley*, 9 F.3d 774, 781 (9th Cir. 1993). A grant of summary judgment is reviewed *de novo*. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

A. *Equitable Lien Claim Against the Army*

The district court held that Blue Fox's suit against the Army is barred by the doctrine of sovereign immunity. However, sovereign immunity against federal agencies has been waived as to suits "seeking relief other than money damages," under the Administrative Procedure Act, 5 U.S.C. § 702 ("APA"). The Supreme Court has held that monetary relief is available under the APA when it takes the form of specific relief rather than compensatory damages. *Bowen v. Massachusetts*, 487 U.S. 879, 893, 108 S.Ct. 2722, 2731, 101 L.Ed.2d 749 (1988). In *Bowen*, the Supreme Court quoted from Judge Bork's opinion in *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985), to explain the scope of the APA waiver of immunity for suits seeking other than money damages:

> "We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms."

Bowen, 487 U.S. at 895, 108 S.Ct. at 2732. Here, Blue Fox seeks an equitable lien only for the very thing to which it is entitled under the contract. Blue Fox does not seek any consequential damages to compensate losses suffered beyond the contract price. Therefore, the district court had jurisdiction to consider its claim under the APA.

1. APA Waiver Not Limited to Statutory Rights

The district court erred in assuming that because Blue Fox sought monetary relief and its right was not statutorily derived, such relief constituted "money damages" and was excluded from the waiver of sovereign immunity contained in the Administrative Procedure Act. The district court characterized the issue as a choice between an action for damages or an action for payment of money to which Blue Fox was *statutorily* entitled. Because the Miller Act does not provide a remedy for subcontractors against the government, the district court held that nonstatutory remedies were barred and the APA could not apply to

waive immunity. However, there is no requirement in *Bowen* or the APA that the specific relief requested be statutorily granted. That is, a party need not rely upon a statute in order to obtain federal court jurisdiction under the APA. *See Aetna Casualty and Surety Co. v. United States*, 71 F.3d 475 (2nd Cir. 1995) (APA waived sovereign immunity against subrogation claim because surety's right to subrogation, arising by operation of law, was equitable and therefore included in APA waiver). Although *Bowen* itself was concerned with funds to which Massachusetts was entitled by statute, there is nothing in that opinion that suggests the APA's waiver of immunity is limited to suits brought under another statute. Thus, the district court erred in assuming that because Blue Fox was not entitled to relief under the Miller Act, its equitable lien claim was impermissible under the APA.

2. An Equitable Lien Claim is Not an Action for Damages

This circuit has recognized subcontractors' equitable rights against the government where the subcontractor was not paid by the prime contractor, the government had notice, and the government did not pay the subcontractor or withhold payment to the prime contractor. *Wright v. United States Postal Service*, 29 F.3d 1426 (9th Cir. 1994). The Army has conceded that Blue Fox would have an equitable lien claim, i.e. a non-damages claim, if a private party, rather than a government agency had contracted with Verdan. The fact that the Army is the defendant does not change the nature of the claim, but only requires analysis of the Army's immunity. Since the APA waives immunity for equitable actions, the district

court had jurisdiction under the APA. Below we reconstruct a brief history of the right asserted by Blue Fox in order to trace its roots in equity.

The Suretyship Cases—Equitable Right of Subrogation

In *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404, 28 S.Ct. 389, 52 L.Ed. 547 (1908), the Court held that a surety had an equitable right of subrogation against the United States because it had "paid the laborers and material-men, and thus released the contractor from his obligations to them, and to the same extent released the Government from all equitable obligations to see that the laborers and supplymen were paid." *Id.* at 410, 28 S.Ct. at 391. The surety's right of subrogation was found to be superior to that of a bank which had loaned money to the contractor to finish the project because the surety was bound by contract to pay the subcontractor.

The equitable right of subrogation by a surety has been extended in a number of cases. *See e.g. Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962) (Miller Act does not alter surety's equitable right of subrogation which arose out of surety's payment of laborers and materialmen in accordance with bond agreement); *Aetna Casualty*, 71 F.3d 475 (APA waived sovereign immunity against subrogation claim because surety's right to subrogation, arising out of payments to coal mine employees suffering from black lung disease, was equitable and therefore included in APA waiver).

Extension to Equitable Rights in Subcontractors

The *Henningsen* line of cases decree that the doctrine of subrogation is an equitable one. Blue Fox does not assert a right of subrogation against the Army. However, following the suretyship cases, courts have recognized subcontractors' equitable rights against government agencies in situations where a surety who paid the subcontractor would have had a equitable right of subrogation against the government. *See e.g. Wright*, 29 F.3d 1426; *Active Fire Sprinkler Corp. v. United States Postal Service*, 811 F.2d 747 (2d Cir. 1987); *Kennedy Electric Co. v. United States Postal Service*, 508 F.2d 954 (10th Cir. 1974). The question presented in this appeal is whether these equitable rights are enforceable under the APA.

In *Wright*, we held that subcontractors could institute actions to establish equitable liens against the U.S. Postal Service. It was clear in *Wright* that such equitable liens are properly characterized as equitable remedies, rather than money damages. In recognizing that the Miller Act's provision of a remedy to sue on the bond did not preclude the assertion of an equitable lien, we quoted approvingly from a Second Circuit case that presented a similar question:

> 'Prior to the waiver of immunity, subcontractors possessed an equitable right . . . , but apparently lacked a remedy due to immunity. *Any equitable rights held by subcontractors as against [the] USPS, which may have been unenforceable where sovereign immunity existed, became enforceable upon immunity being waived.*'

Wright, 29 F.3d at 1430 (quoting *Active Fire*, 811 F.2d at 754).

The Army claims the Postal Service cases are inapposite because they rely on the Postal Reorganization Act, 39 U.S.C. § 401(a) (1982), which authorized the U.S. Postal Service to "sue and be sued," and therefore did not speak to the ability of subcontractors to sue under the APA. However, the Postal Service Cases are relevant because although the waiver of sovereign immunity is found in the Postal Reorganization Act, they recognize non-Miller Act claims against federal agencies for equitable liens as equitable in nature. Since such equitable liens are not actions for "money damages," they are allowed by the APA's waiver of sovereign immunity as well.[4]

3. Equitable Lien Attached Upon Notice to Army of Blue Fox's Non Payment

"An equitable lien can be established and enforced only if there is some property which is subject to the lien." Restatement of Restitution § 161, comment e (1937). Blue Fox gave notice to the Army on May 26, 1994 and June 15, 1994 that it had not been fully paid. The Army subsequently paid Verdan $86,132.33 before

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[4] In *Active Fire*, the court noted that there was a long line of cases that characterize the Miller Act as the only remedy for subcontractors in a government building contract. *Active Fire*, 811 F.2d at 754. The government's brief similarly emphasizes broad language from *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1288 (7th Cir. 1984) (if prime contractor fails to obtain a payment bond, the subcontractor, rather than the government, is "left holding the bag.") However, none of these cases considered an equitable lien theory, and as we have previously recognized, "Nothing in the Miller Act evinces a legislative intent to limit remedies available to subcontractors." *Wright*, 29 F.3d at 1431.

terminating the contract. Thus, at the time the Army received notice from Blue Fox, it retained funds to which the equitable lien attached. The fact that the Army has since paid out the monies to which the lien attached does not thwart Blue Fox's equitable lien claim. In the suretyship context, the Federal Claims Court has noted:

> where the government has on hand contract funds owing for work done and is alerted . . . to the possibility of unpaid materialmen's claims . . . it may not dispense those funds to the contractor—at least not without running the distinct risk of having to pay twice.

Transamerica Premier Ins. Co. v. U.S., 32 Fed. Cl. 308, 314 (1994). The Army cannot escape Blue Fox's equitable lien by wrongly paying out funds to the prime contractor when it had notice of Blue Fox's unpaid claims.

B. *Equitable Claim Against SBA*

The district court granted the SBA's motion for summary judgment because it found that, as the Army had sole possession and control over the contract and made all payments to Verdan, there was no *res* or fund which the SBA controlled or possessed. Because an equitable lien may only exist where there is a *res* to which it attaches, and because SBA did not have possession or control of any contract funds, we affirm the district court.

This is a somewhat atypical case. The Small Business Act provides opportunities for socially and economically disadvantaged businesses through SBA recruitment, support, and loans. 15 U.S.C. § 636. Thus, the SBA usually plays a protective and supportive

role to the small business which is awarded a contract with a governmental agency.[5] However, in this case, the SBA delegated nearly all responsibility for the contract administration to the Army, and abdicated any protective role toward Verdan and the subcontractors. Thus, while the SBA ordinarily would have at least constructive possession of contract funds to which an equitable lien could attach, SBA's delegation of responsibility to the Army, another government agency which itself may be held liable, requires a different result.

Blue Fox argues that the SBA had the opportunity, authority, and duty to intervene, and therefore should be liable for an equitable lien. Blue Fox correctly observes that SBA was largely responsible for the Army's withdrawal of its Miller Act requirement in the tripartite contract.[6] In addition, SBA did not conform to regulations in place at the time of the contract which would have required the SBA to admin-

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[5] "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns. . . ." 15 U.S.C. § 631(a), Declaration of Policy.

[6] Blue Fox provided evidence of the SBA's conscious avoidance of the Miller Act requirements in the form of notes of telephone conversations within the SBA. The notes recorded a conversation between officers of the SBA and the Army in which they discussed the need for a bond and the fact that "Verdan doesn't have the experience to get a bond in this area." The Army official explained that she was advised by "Ms. Witty, out of the SBA office," that "in order to protect the government's interest, [they should] require that Verdan show the government evidence that their sub[contractor] had bonded the construction portion of the contract." However, neither party has claimed that Blue Fox was ever required to acquire a bond on the construction portion of the contract.

ister a special bank account upon the waiver of Miller Act requirements. Although these actions show SBA's responsibility and culpability for the harm Blue Fox suffered in this case, the fact remains that SBA did not have possession of a *res* to which an equitable lien could attach. Thus, although we agree with Blue Fox that SBA did not fulfill its statutory duties, an equitable lien theory cannot provide Blue Fox with relief against the SBA.

CONCLUSION

For the foregoing reasons, the district court decision is **REVERSED IN PART** and **AFFIRMED IN PART** and **REMANDED** for further proceedings consistent with this opinion. Blue Fox is entitled to its costs on appeal.

RYMER, Circuit Judge, concurring in part and dissenting in part:

Never before has a court held that a subcontractor may sue an agency of the United States, which has not agreed to be sued, for contract monies that the prime contractor should have paid to the subcontractor but didn't. It has been the law for decades that subcontractors cannot enforce a lien on government property unless the government has waived sovereign immunity. Yet, the majority now says that a district court has jurisdiction to consider a subcontractor's claim for an equitable lien under the Administrative Procedure Act, because it is not an action for money damages but "an action for specific performance for the payment of money." Maj. op. at 1358. However, no matter how you slice Blue Fox's claim, it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond. Since the law is

well settled that this may not be done unless the contracting agency has agreed to be sued, I dissent.

Congress chose to protect those who work on government property (who would otherwise have materialmen's and workmen's liens for work on non-government property) primarily through the Miller Act, by requiring contractors to furnish a payment and performance bond, instead of by permitting subcontractors to enforce liens through an overarching waiver of sovereign immunity. The Miller Act gives subcontractors the right to sue on the bond "in the name of the United States for the use of the person suing." 40 U.S.C. § 270b(b). But neither the Federal Tort Claims Act, the Miller Act, nor the Tucker Act, waives sovereign immunity to permit a subcontractor to sue the United States directly in its own right for monies the subcontractor should have received, but did not receive, from the prime contractor. *See Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650-51 (9th Cir. 1992) (FTCA); *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1289-90 (7th Cir. 1984) (Miller Act); *United Elec. Corp. v. United States*, 227 Ct.Cl. 236, 647 F.2d 1082, 1087 (1981) (Tucker Act). As Judge Easterbrook recently observed for the Seventh Circuit, "[W]hen a prime contractor on a federal construction project fails to obtain a Miller Act payment bond and then defaults without paying his subcontractors . . . the hapless subcontractor, not the United States, is left holding the bag." *Automatic Sprinkler Corp. v. Darla Envt'l Specialists, Inc.*, 53 F.3d 181, 182 (7th Cir. 1995). Whether felicitous or not, this has been the conventional wisdom for at least fifty years. *See United States v. Munsey Trust Co.*, 332 U.S. 234, 241, 108 Ct.Cl. 765, 67 S.Ct.

1599, 1602, 91 L.Ed. 2022 (1947) ("[N]othing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation.").

For sure, we indicated in *Wright v. United States Postal Service*, 29 F.3d 1426 (9th Cir. 1994), that equitable liens may be enforced, like other remedies available to subcontractors may be pursued, when there is a specific waiver of immunity as there is, for example, for the Postal Service, in the Postal Reorganization Act, 39 U.S.C. § 401(1). However, in the absence of an agency waiver, subcontractors cannot achieve "by indirection a result that they could not reach directly under the Miller Act." *Westbay*, 970 F.2d at 651 (quoting *Arvanis*, 739 F.2d at 1292); *cf. Wright*, 29 F.3d at 1428 (specific waiver in Postal Reorganization Act); *Active Fire Sprinkler Corp. v. United States Postal Service*, 811 F.2d 747, 754 (2d Cir. 1987) (same); *J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990) (waiver of sovereign immunity under Small Business Act not broad enough to support an equitable lien claim by a subcontractor against the SBA).

This is just what the majority has managed to allow. It reasons that the APA waiver recognized in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), is not limited to statutory rights, but whether that is so or not is beside the point unless the government has a duty which can be specifically enforced. Here, it has none. Under the Miller Act there is no question the Army should not have approved the Verdan contract without ensuring that there was an adequate surety bond, but its failure to do so is not actionable. *Westbay*, 970 F.2d at 650 (citing authorities). The absence of a bond is

precisely what caused Blue Fox's loss—or, put another way, gave rise to its asserted equitable lien against the retainage—in this case. Unlike the majority, I don't think it matters that the right asserted is *equitable*, *see Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 141, 83 S.Ct. 232, 236, 9 L.Ed.2d 190 (1962), because equitable rights held by subcontractors become *enforceable* only when immunity is waived by the contracting agency. *See Wright*, 29 F.3d at 1428; *Active Fire*, 811 F.2d at 754; *United Elec. Corp.*, 647 F.2d at 1086. Otherwise, the Miller Act provides the remedy available to subcontractors for contractor defaults.

> As the Seventh Circuit has remarked:
>
> The result is . . . unjust. A subcontractor who fulfills his part of the bargain should not suffer because the prime contractor defaulted, and the government contracting officer had not insisted on compliance with the Miller Act. We agree that there is a practical problem (how widespsread we do not know) that is not addressed by the Miller Act, but that is a problem that can only be addressed, and redressed, by Congress.

Arvanis, 739 F.2d at 1293. Because Congress has not waived the Army's sovereign immunity, I dissent from Part IIA of the majority opinion, and because even assuming Congress has waived the SBA's immunity to be sued for an equitable lien[1] there is no

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[1] *Compare Driskill*, 901 F.2d at 386 (subcontractor cannot sue SBA for equitable lien), *with ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1113 (D.C. Cir. 1988) (subcontractor can sue the SBA for an equitable lien).

fund to which Blue Fox can lay claim, I concur in the result of Part IIB.[2]

[2] As the SBA never possessed contract funds, there has never been a *res* to which an equitable lien might attach. In my view, that is dispositive of the legal issue before us, and so I do not join the majority's discussion of the SBA's culpability.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35648

D.C. No. CV 95-00612-HJF

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF-APPELLANT

v.

SMALL BUSINESS ADMINISTRATION;
THE UNITED STATES ARMY,
DEFENDANTS-APPELLEES

[Filed: Nov. 7, 1997]

ORDER

Before: FERGUSON, REINHARDT, and RYMER, Circuit Judges.

Judge Ferguson and Judge Reinhardt have voted to deny the petition for rehearing. Judge Rymer has voted to grant the petition.

Judge Ferguson has recommended rejection of the en banc suggestion. Judge Reinhardt has voted to deny the suggestion. Judge Rymer has voted to accept the suggestion.

The full court has been advised of the suggestion for rehearing en banc and no judge of this court has

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 95-612-FR

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY, DEFENDANTS

[Filed: May 24, 1996]

OPINION

FRYE, Judge:

The matters before the court are the plaintiff's motion for summary judgment (#18) and the defendants' motion for summary judgment (#26).

UNDISPUTED FACTS

On September 29, 1993, pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), the defendant, the United States Department of the Army (the Army), awarded a contract, No. DAEA08-93-C-0056, to the defendant, the United States Small Business Administration (the SBA). The SBA in turn awarded the contract to Verdan Technology, Inc. (Verdan), an eligible Section 8(a) contractor. Under the terms of the contract between the SBA and Verdan, Verdan

agreed to upgrade the telecommunications capability of the Army Depot in Umatilla, Oregon. The contract between the SBA and Verdan had two phases: (1) the construction of a building to house telephone switching equipment; and (2) the installation, testing and putting on-line of the equipment.

Verdan entered into a subcontract with the plaintiff, Blue Fox, Inc. (Blue Fox), whereby Blue Fox agreed to construct a 20 x 25 foot concrete block building in which to house the switching system; to install a cable vault underneath the building; and to provide all of the electrical systems, the fire suppression/detection systems, the air conditioning/heating systems, and the structural details of the concrete block building. The cost of the work to be performed by Blue Fox was $186,347.80. This sum represented 43% of all of the funds received by Verdan from the SBA.

Although the Army designated the contract between the Army and the SBA under Standard Industrial Classification Code 4813, Telephone Communications, the Army treated the contract as a service contract, rather than a construction contract. Because the Army treated the contract as a service contract rather than a construction contract, Verdan was not required to furnish, and it did not furnish, a payment or performance bond as required by the Miller Act, 40 U.S.C. § 270a(a)(2), for contracts for the construction of public buildings. Blue Fox did not know until it had completed its performance under the contract that Verdan had not furnished a payment or performance bond. Pursuant to the terms of the contract, the Army made all payments directly to Verdan. Verdan did not pay Blue Fox the sum of $46,586.14, which was

due on its contract with Blue Fox. Blue Fox informed the Army and the SBA in writing on May 26, 1994, and again on June 15, 1994, that it had not been paid.

On January 3, 1995, the Army terminated its contract with Verdan and the SBA because of Verdan's failure to adhere to the delivery schedule contained in the contract and to submit Contractor Data Requirement lists. At the time that the Army terminated its contract with Verdan, it had disbursed $348,000.00 to Verdan. Of that amount, $269,481.35 was disbursed to Verdan for site preparation and the construction of the housing facility. No funds were held back or retained under the contract.

At the time that the Army terminated its contract with Verdan, Verdan had not completed the project: specifically, it had not entered the subscribing data base into the new telephone switch, completed the testing of the switch, or finished the "cutting over" to the new switch. The Army subsequently modified an existing services contract that it had with Dynamic Concepts, Inc. so that Dynamics Concepts, Inc. would complete the contract that Verdan had failed to complete for $126,772.78. The modification of the Dynamic Concepts, Inc. contract was partially funded with the undisbursed balance of the Verdan contract, which was $84,910.52. This $84,910.52 was intended to pay for the installation and the testing of the telephone switch. The installation and the testing of the telephone switch had not been performed at the time that the Army terminated its contract with Verdan.

On January 15, 1995, Blue Fox obtained a default judgment in the Tribal Court of the Yakima Indian Nation against Verdan and its officers, Gary C. An-

drews and William J. Reubel, Jr. Blue Fox has not collected on this judgment.

Blue Fox brings this claim against the Army and the SBA seeking an equitable lien upon the funds retained by the Army and the SBA under the Verdan contract and/or upon any funds available or appropriated for a follow-up contract for the completion of the electronic switching system project of the Umatilla Army Depot to secure payment of $46,586.14 to Blue Fox. Blue Fox alleges that the Verdan contract was subject to the Miller Act; that, as a person supplying labor and materials on that contract, Blue Fox was entitled to the protection of a Miller Act payment bond; that no Miller Act payment bond was furnished under the Verdan contract; and that the Army and the SBA violated the Miller Act by failing to insure that a bond was in place to protect Blue Fox.

Blue Fox moves the court for summary judgment, and the Army and the SBA move the court for summary judgment.

CONTENTIONS OF THE PARTIES

Blue Fox contends that because the Army and the SBA failed to provide a payment bond for the protection of Blue Fox as required by the Miller Act, this court should grant summary judgment in favor of Blue Fox and impose an equitable lien upon the property of the Army and the SBA to the extent of the amount owed to Blue Fox.

The government contends that the claim by Blue Fox against the Army is barred by the doctrine of sovereign immunity, and that the claim against the SBA must be dismissed because the SBA does not

own or possess any property to which a lien may attach.

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

ANALYSIS AND RULING

1. *Jurisdiction*

Jurisdiction is an issue in this case because Blue Fox brings a claim against the United States. Such suits are generally barred by the application of the doctrine of sovereign immunity. Blue Fox contends that this court has jurisdiction to hear its claim for an equitable lien against the Army and the SBA under 28 U.S.C. § 1331; the Small Business Act, 15 U.S.C. § 634(b)(1); and the Administrative Procedures Act, 5 U.S.C. §§ 702-704, 706. Because this is a court of limited jurisdiction, before examining the merits of the claim, the court will determine whether this court has jurisdiction to determine this dispute.

A. *Jurisdiction Over the Claim Against the Army*

Absent a waiver, the doctrine of sovereign immunity protects the federal government and its agencies from suit. *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *FDIC v. Meyer*, __U.S. __, 114 S.Ct. 996, 1000 (1994). 28 U.S.C. § 1331 does not, of itself, constitute a waiver of sovereign immunity.[1] *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484 n. 3 (9th Cir. 1985), *cert. denied*, 474 U.S. 919 (1985) (citing *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982)). The Administrative Procedures Act (APA) allows a suit to be brought against the United States where the complainant seeks relief other than money damages. The APA provides, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . .

5 U.S.C. § 702 (emphasis added).

The government contends that the claim against the Army is barred because Blue Fox seeks money

[1] 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

damages. The SBA contends that the relief available to Blue Fox is restricted to the Army's performance of any legal duty it had under the Miller Act and does not include monetary compensation which is a substitute for the suffered loss. Blue Fox contends that this court has jurisdiction under the APA because Blue Fox is seeking an equitable lien, not money damages. Both parties cite *Bowen v. Massachusetts*, 487 U.S. 879 (1988), in support of their positions.

In *Bowen*, the Secretary of Health and Human Services refused to reimburse the State of Massachusetts for certain expenditures that it made under the Medicaid program. The State of Massachusetts challenged this order, alleging that the sovereign immunity of the United States had been waived under the APA. The court found for the State of Massachusetts and ordered the federal government to pay the State of Massachusetts the monies which had been wrongfully withheld. On appeal, the court held that the district court lacked jurisdiction to enter a money judgment against the Secretary of Health and Human Services. The matter was appealed to the United States Supreme Court. The Court ruled that the complaint was not barred by the APA's prohibition against suits for money judgments. The Court reasoned that the State of Massachusetts had not sought damages owed by reason of the failure of the Secretary of Health and Human Services to perform a statutory duty, but was a suit to compel the performance of a duty. The suit was held to be within the purview of the APA, even though it involved the payment of money. 487 U.S. at 899-900.

The test applied by the United States Supreme Court in *Bowen* to determine whether a suit is for

money damages and therefore not waived by the doctrine of sovereign immunity is whether the damages sought are a substitute for a suffered loss (i.e., compensation) or an attempt to obtain the very thing to which the plaintiff is entitled. The former is an action for money damages, while the latter is a suit for specific relief. *Id.* at 895.

Here, the question is whether Blue Fox seeks money damages for a loss suffered, or whether Blue Fox seeks funds to which it is entitled by statute. In other words, Blue Fox must allege and prove that it was entitled under the Miller Act to reimbursement from the Army for the payments that were not made by Verdan to Blue Fox in order for this court to have jurisdiction over Blue Fox's claim against the Army.

The Miller Act states, in relevant part:

> Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":
>
> . . . .
>
> (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. . . .

40 U.S.C. § 270a(a).

Thus, if the contract for the installation of the telephone switching system in the Umatilla Army Depot was "for the construction . . . of any public building," Verdan was required to furnish the government with a payment bond for the protection of subcontractors.

The Army classified the Verdan contract as one for services, rather than one for construction, so that the requirements of the Miller Act would not apply. Blue Fox contends that the contract should have been designated as a contract for construction, and Verdan should have been required to furnish a bond, but that the Army and the SBA deleted any requirement for Verdan to furnish a bond and designated the contract as one for services because Verdan was unable to obtain a bond. While a substantial portion of the contract included construction, the contracting agency determined that the contract was primarily a service contract, and that it therefore did not fall under the Miller Act. This court agrees with that determination.

Even if the Miller Act applied to the contract, the Army had no contractual obligation or statutory obligation to pay Blue Fox. The Miller Act neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract. *See Fanderlik-Locke Co. v. United States ex rel. M. B. Morgan*, 285 F.2d 939 (10th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

The United States Court of Appeals for the Seventh Circuit addressed this issue in *Arvanis v. Noslo*

Eng'g Consultants, Inc., 739 F.2d 1287, 1288 (7th Cir. 1984):

> The [Miller Act] places no affirmative obligation on the government, and says absolutely nothing about what happens when the contractor fails to furnish the bond. The Act grants a very narrow and specific right to those in appellants' position: the right to sue on the bond (if there happens to be one) "in the name of the United States for the use of the person suing." 40 U.S.C. § 270b(b). . . . There is clearly no waiver of sovereign immunity here. There does seem to be a gap in the statute; there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement. However, this is not a gap that we can fill with a remedy—especially in view of the very narrow remedy actually granted by the statute.

The relief sought by Blue Fox is the money damages it suffered when Verdan failed to pay Blue Fox in full. The waiver of sovereign immunity provided by the APA does not apply to the claim of Blue Fox against the Army.

The court concludes that it does not have jurisdiction to determine the claim of Blue Fox against the Army. The motion of the Army for summary judgment is granted.

B. *The SBA*

The SBA is unique in that the "sue and be sued" provisions of the Small Business Act, 15 U.S.C. § 634(b)(1), provide an independent basis for jurisdiction by this court over the SBA. Jurisdiction is proper over the SBA in this case.

2. *Claim Against the SBA*

Blue Fox seeks an order against the SBA establishing an equitable lien against the amount remaining on the Dynamic Concepts, Inc. contract and directing the SBA to pay to Blue Fox from those funds the amount of $46,586.14.

The SBA received no funds under the Verdan contract and has no authority to obtain funds from the contract between the Army and Dynamic Concepts, Inc. The Army terminated the Verdan contract, and this termination included both Verdan as the subcontractor and the SBA as the prime contractor. There is no res or identifiable property in the possession or under the control of the SBA to which an equitable lien may attach.

The motion of the SBA for summary judgment is granted.

CONCLUSION

The motion of Blue Fox for summary judgment (#18) is denied. The motion of the Army and the SBA for summary judgment (#26) is granted. Judgment will be entered in favor of the Army and the SBA.

DATED this 24 day of May, 1996.

/s/ HELEN J. FRYE
HELEN J. FRYE
United States
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 95-612-FR

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY, DEFENDANTS

[Filed: May 24, 1996]

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the defendants and against the plaintiff.

DATED this 24 day of May, 1996.

/s/ HELEN J. FRYE
HELEN J. FRYE
United States
District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. CV 95-612-FR

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY, DEFENDANTS

(Suit for Equitable Lien on Federal Construction Project)

INTRODUCTION

1.

This is a suit for an equitable lien by an unpaid subcontractor on a federal construction project.

PARTIES

2.

Plaintiff is a Washington Corporation engaged in the construction industry.

3.

Defendant United States Small Business Administration ("SBA") is an agency of the United States Government. Defendant United States Department

of the Army ("Army") is an agency of the United States Government.

JURISDICTION

4.

Jurisdiction over Defendant SBA is based on the Federal Question Statute, 28 USC § 1331, the Small Business Act, 15 USC § 634(b)(1), and the Administrative Procedure Act [,] 5 USC §§ 702-704 and 706.

5.

Jurisdiction over Defendant Army is based on the Federal Question Statute, 28 USC § 1331, and the Administrative Procedure Act [,] 5 USC §§ 702-704 and 706.

FACTS

6.

On or about September 29, 1993, pursuant to Section 8(a) of the Small Business Act, 15 USC § 637(a), Defendant Army awarded Contract Number DAEA08-93-C-0056 to Defendant SBA. Defendant SBA in turn awarded the contract to Verdan Technology, Inc. ("Verdan"), an eligible 8(a) contractor.

7.

Under Contract Number DAEA08-93-C-0056, Verdan was required to install a Government Furnished Equipment (GFE) AT&T Definity G1 Electronic Switching System (ESS) at Umatilla Army Depot, Oregon. Item 0001 of the contract required construction of a 20 foot by 25 foot (500 square foot) concrete block building with concrete foundation and gable roof in which to house the switching system. The contractor was also required to install a 6 foot by 20 foot

cable vault underneath the new building, and provide all electrical, fire suppression/detection systems, air conditioning/heating systems, and structural details of the new building.

8.

On October 14, 1993, Verdan and Plaintiff entered into a written subcontract agreement. Under this subcontract, Plaintiff agreed to perform the construction portion of Contract Number DAEA08-93-C-0056, including the construction work described in paragraph 7 above, for a total price of $185,522.80. A subsequent change order increased the price to $186,347.80. Plaintiff's subcontract price represented approximately 43% of the $430,879.00 total price of the contract between Defendant SBA and Verdan.

9.

Plaintiff satisfactorily completed all work under the subcontract. However, Verdan failed to pay Plaintiff $46,586.14 which is still owing for construction work performed by Plaintiff at the Umatilla Army Depot.

10.

On or about January 3, 1995, Defendant Army issued a modification to Contract Number DAEA08-93-C-0056 terminating Verdan's contract for default. Said termination relates to Verdan's failure to complete Item 0002 of the contract, and is unrelated to work provided by Plaintiff.

11.

On January 17, 1995, Plaintiff obtained a default judgment in the Tribal Court of the Yakima Indian Nation against Verdan Technologies, Inc., and its of-

ficials William J. Reubel, Jr. and Gary C. Andrews, Tribal Court Case No. C-94-77. Plaintiff has collected no part of said judgment. Existing liens against Verdan Technologies, Inc., in the amount of $248,000 precede Plaintiff's judgment. Existing liens against William J. Reubel, Jr. and Gary C. Andrews far exceed said individuals' net worths.

FIRST CLAIM FOR RELIEF

(Equitable Lien)

12.

Contract Number DAEA08-93-C-0056 was subject to the Miller Act, 40 USC § 270a(a)(2). Said statute provides, in relevant part, that "[b]efore any contract for the construction, alteration or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds . . . (2) A payment bond . . . for the protection of all persons supplying labor and material in the prosecution of the work . . . ."

13.

Plaintiff was a "person[] supplying labor and material in the prosecution of the work . . . ." within the meaning of 40 USC § 270a(a)(2). As such, Plaintiff was entitled to the protection of a Miller Act payment bond.

14.

Notwithstanding the requirements of 40 USC § 270a(a)(2), no Miller Act payment bond was furnished under Contract Number DAEA08-93-C-0056 to protect Plaintiff.

15.

By failing to ensure that a bond was in place to protect Plaintiff, Defendant SBA and Defendant Army each violated the Miller Act, 40 USC § 270a(a)(2).

16.

Plaintiff was unaware, until approximately June 15, 1994, that no Miller Act bond was in place for its protection. On the contrary, Plaintiff had believed such a bond was in place, in part due to Verdan's insistence that Plaintiff put up a bond to protect lower tier subcontractors and suppliers.

17.

On June 15, 1994, Plaintiff promptly informed both Defendant Army and Defendant SBA in writing that Plaintiff was an unpaid subcontractor, and requested that Verdan's payment be suspended or reduced until Plaintiff was fully paid.

18.

Despite Plaintiff's request, Defendant Army fully paid Verdan for that portion of Contract Number DAEA08-93-C-0056 performed by Plaintiff.

19.

As a result of the failure of Defendant Army and Defendant SBA to ensure that a Miller Act payment bond was furnished, Plaintiff has been unable to collect the $46,586.14 Verdan failed to pay.

20.

An equitable lien should therefore be placed upon retained funds under Contract Number DAEA08-93-

C-0056 to secure payment to Plaintiff of $46,586.14, plus interest and attorneys fees.

21.

In the alternative, an equitable lien should be placed on any funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project.

22.

Defendants should also be enjoined from paying any further moneys under Contract Number DAEA08-93-C-0056, or making any payments from funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project, until Plaintiff's unpaid bill is satisfied.

WHEREFORE, Plaintiff prays for relief as follows:

1. Against Defendant Small Business Administration:

a. for an Order declaring that an equitable lien exists for Plaintiff's benefit, up to $46,586.14, plus interest and attorney's fees, on retained funds under Contract Number DAEA08-93-C-0056;

b. for an Order directing payment to Plaintiff from said retained funds in the amount of $46,586.14, plus interest and attorney's fees;

c. in the alternative, if no retained funds exist, for an Order declaring that an equitable lien exists for Plaintiff's benefit, up to $46,586.14, plus interest and attorney's fees, on all funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project;

d. for an Order directing the payment to Plaintiff from said funds in the amount of $46,586.14, plus interest and attorney's fees;

e. for a money judgment of $46,586.14;

f. for Plaintiff's costs under 28 USC § 2412(a)(1);

g. for interest on $46,586.14 from May 24, 1994 until paid under the Prompt Payment Act, 31 USC § 3902 and the Contract Disputes Act, 41 USC § 611;

h. For Plaintiff's attorney's fees under the Equal Access to Justice Act, 5 USC § 504 and 28 USC § 2412(b), and the Verdan-Blue Fox subcontract;

2. Against Defendant Department of the Army:

a. for an Order declaring that an equitable lien exists for Plaintiff's benefit, up to $46,586.14, plus interest and attorney's fees, on retained funds under Contract Number DAEA08-93-C-0056;

b. for an Order directing payment to Plaintiff from said retained funds in the amount of $46,586.14, plus interest and attorney's fees;

c. in the alternative, if no retained funds exist, for an Order declaring that an equitable lien exists for Plaintiff's benefit, up to $46,586.14, plus interest and attorney's fees, on all funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project;

d. for an Order directing the payment to Plaintiff from said funds in the amount of $46,586.14, plus interest and attorneys fees;

e. in the alternative, for an injunction ordering Defendant Army to pay to Defendant SBA, its prime contractor under Contract Number DAEA08-93-C-0056, $46,586.14,

f. for an injunction enjoining Defendants from paying any further moneys under Contract Number DAEA08-93-C-0056, or making any payments from funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project, until Plaintiff's unpaid bill is satisfied;

g. for Plaintiff's costs under 28 USC § 2412(a)(1);

h. for interest on $46,486.14 from May 24, 1994 until paid under the Prompt Payment Act, 31 USC § 3902 and the Contract Disputes Act, 41 USC § 611;

i. For Plaintiff's attorney's fees under the Equal Access to Justice Act, 5 USC § 504 and 28 USC § 2412(b), and the Verdan-Blue Fox subcontract;

3. For such other and further relief which may be equitable and just.

Respectfully submitted this 11th day of May, 1995.

/s/ THOMAS F. SPAULDING
THOMAS F. SPAULDING, OSB #85003
Attorney for Plaintiff

Supreme Court, U.S.
FILED
MAY 28 1998
OFFICE OF THE CLERK

(2)

No. 97-1642

In The

Supreme Court of the United States

October Term, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,

Petitioner,

vs.

BLUE FOX, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS F. SPAULDING
Counsel of Record
SPAULDING COX & SCHAEFFER, LLP
Attorneys for Respondent
1205 N.W. 25th Avenue
Portland, Oregon 97210-2497
(503) 222-3815

146632

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

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QUESTION PRESENTED

Should this Court expend its limited resources to resolve an issue of first impression that arises only when the United States government fails to comply with the requirements of the Miller Act, namely: Is a subcontractor's suit to enforce an equitable lien against the United States a suit for "money damages" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, and this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

STATEMENT PURSUANT TO RULE 29.6

Respondent Blue Fox, Inc. has no parent companies and no nonwholly owned subsidiaries.

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APPENDIX

Appendix A — Transcript Of Oral Argument By Government Counsel 1a

STATEMENT OF THE CASE

In September, 1993, pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), the United States Department of the Army awarded a contract to the United States Small Business Administration. Pet. App. 2a. The contract involved the installation and testing of a telephone switching system and the construction of a facility to house the switching system at the Umatilla Army Depot, Oregon. *Id.* SBA agreed to furnish the supplies and services requested by the Army by subcontracting with Verdan Technology, Inc. *Id.*

Verdan subcontracted the construction portion of its contract to respondent Blue Fox. Pet. App. 4a. The total cost of the work to be performed by Blue Fox was $186,347.80. *Id.* Blue Fox did not know until it had completed its performance under the contract that Verdan had not furnished a payment bond. *Id.* Verdan failed to pay blue Fox its full contract price — the sum of $46,586.14 remained due. *Id.* Blue Fox informed the Army and SBA in writing on May 26, 1994, and again on June 15, 1994, that it had not been fully paid. *Id.* Nevertheless, the Army subsequently disbursed a total of $86,132.33 to Verdan between July and October, 1994. *Id.*

On January 3, 1995, the Army terminated Verdan's contract for default. Pet. App. 5a. In its notice of intention to terminate the contract, the Army indicated that one of its "most severe items of concern" was Verdan's failure to pay Blue Fox. *Id.* After the termination of the Verdan contract, the Army chose Dynamic Concepts, Inc. to finish the uncompleted portion of the work, under an existing contract between the Army and Dynamic. The modification contract with Dynamic was for $126,772.78 and was partially funded with the undisbursed balance on the Verdan contract, $84,910.52. *Id.* The Army did not authorize payment to Dynamic for its work in completing the project until July 27, 1995,

two months after Blue Fox filed suit in district court, asking *inter alia*, that the court enjoin the Army and SBA from paying any further monies or making any payments from funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project, until Blue Fox's unpaid bill is satisfied. *Id.*

The original solicitation issued by the Army required the contractor to furnish payment and performance bonds if the contract exceeded $25,000. Pet. App. 3a. However, the Army later amended the solicitation, deleting the bond requirements. *Id.* Nevertheless, the Army conceded below that the Verdan contract was subject to the Miller Act, 40 U.S.C. §§ 270a-270d. *Id.*

When Blue Fox asked, in an Interrogatory, to explain why no Miller Act bond was in place for its protection, the Army answered as follows:

> **ANSWER:** The reason is not clear from the record. It may have been because the contract was classified under Standard Industrial Classification (SIC) Code 4813, telephone communications, and that government personnel did not require the payment bond because the primary SIC code was determined to be 4813, a non-construction SIC code. It may also have been because the government believed it could waive the Miller Act requirements.

Excerpts of Record at 29-30, *Blue Fox, Inc. v. SBA*, 121 F.3d 1357 (No. 96-35648).

However, the government conceded, and the Ninth Circuit agreed, that the Miller Act bond requirement could not be waived under the circumstances of this case. Pet. App. 3a. In addition, the Ninth Circuit emphasized "SBA's conscious avoidance of the Miller

Act requirements" in the form of notes of telephone conversations within the SBA," and "between officers of the SBA and the Army. . . ." Pet. App. 13a, n.6. As the result of these conversations, Army officials deleted the performance and payment bonding requirement for Verdan.

REASONS FOR DENYING THE WRIT

The Solicitor General asks this Court to review a decision of the court of appeals that resolves an issue of first impression in the federal courts. He cites no other case — not one — that even discusses the question whether the United States is immune from a subcontractor's suit to enforce an equitable lien under the Administrative Procedure Act, 5 U.S.C. § 702, and this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Since there are no other cases that decide (much less address) this issue, there necessarily is no conflict in the lower courts that might justify this Court's intervention. The best that the government can do is to point to two decisions of other circuits that, the government says, have given somewhat different interpretations to *Bowen* in the ten years since *Bowen* was decided. But this Court ordinarily does not grant review to resolve abstract differences in how the courts of appeal have interpreted one of this Court's cases, in the absence of a true conflict. Here, that hesitation makes especially good sense — the alleged conflict in approach is illusory; it has arisen only rarely in the past decade; and the government has waived, in the courts below, the alternative interpretations of *Bowen* it now advances to this Court. Under these circumstances, the question whether the court of appeals properly applied *Bowen* to this novel situation plainly does not merit this Court's attention. See S. Ct. Rule 10 ("A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

Perhaps recognizing this problem, the government labors (as did the dissent in the court of appeals) to portray the consequences

of the court of appeals' holding as dire and far-reaching. That too is mistaken. As the government acknowledges (Pet. App. 4a-5a), Congress passed the Miller Act, 40 U.S.C. §§ 270a-270d, in order to give subcontractors such as respondent Blue Fox the right to proceed in the government's shoes in a suit on the bond against a defaulting primary contractor. Had the government complied with the requirements of the Miller Act, this lawsuit would never have been brought (and the immunity issue would never have been raised). Thus, it is fair to say that the novel issue presented in this case arises only when the United States fails to comply with federal law. For that reason, the government has the power — merely by complying with federal law — to make this issue go away and to reduce to zero or almost zero the fiscal impact of the Ninth Circuit's decision. There is simply no good reason for this Court to expend its limited resources on resolving an issue that the Executive Branch can moot merely by complying the its legal obligations under the Miller Act.

I.

THE PETITION FAILS TO DEMONSTRATE A CONFLICT AMONG THE CIRCUITS.

A. There Is No Conflict Concerning the Government's Duty To Hold Funds for the Benefit of an Unpaid Subcontractor.

The principal issue posed by the decision below concerns the extent to which this Court's decisions in *Prairie State Bank v. United States*, 164 U.S. 227 (1896)[1]; *Henningsen v. United States*

1. In *Prairie State Bank v. United States*, 164 U.S. 227 (1896), this Court held that a surety, who completed a project following the contractor's default, had a right to monies retained by the government superior to that of a bank which lent money to the defaulted contractor. The Court based its decision on the doctrine that a surety who completes a contract has an "equitable right" to indemnification out of a retained fund. 164 U.S. at 231.

Fidelity & Guaranty Company, 208 U.S. 404 (1908)[2] and *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962)[3], give rise to a duty by the government to hold funds in its possession for the benefit of an unpaid subcontractor. The Petition devotes little or no discussion to this body of Supreme Court law which, in upholding equitable subrogation rights of sureties, has explicitly recognized that rights are held by the subcontractors themselves. *See Pearlman*, 371 U.S. at 141 ("We therefore hold in accord with the established legal principles stated above . . . that the laborers and materialmen had a right to be paid out of the fund; . . ."); *see also Henningsen*, 208 U.S. at 410 (recognizing the government's "equitable obligations to see that the laborers and supplymen were paid.")

Following in *Pearlman*'s steps, several courts have permitted the subcontractor to directly sue the government where immunity

2. In *Henningsen v. United States Fidelity & Guaranty Company*, 208 U.S. 404 (1908), this Court extended the *Prairie State Bank* holding to provide that a surety who satisfied the claims of unpaid laborers and materialmen had an equitable right to retained monies. In holding that the surety's equity was superior to that of a competing lender, the Court specifically noted that the government had "equitable obligations to see that the laborers and supplymen were paid." 208 U.S. at 410.

3. In *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), this Court limited its holding in *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947) to its facts. (In *Munsey*, the Court refused to protect a surety's subrogation claim to retained monies held by the government, against the government's own claim to offset money it was owed.) In an opinion by Mr. Justice Black, the *Pearlman* Court held that the right to a government-retained fund by a surety who paid laborers and materialmen was superior to the claim of the trustee in bankruptcy of the defaulted contractor. The *Pearlman* Court expressly rejected an argument that, in passing the Miller Act, Congress changed the law as declared in the *Prairie State Bank* and *Henningsen* cases. 371 U.S. at 139-140. *The Pearlman* Court also expressly rejected an argument that *Prairie State Bank* and *Henningsen* had been overruled by *Munsey*, 371 U.S. at 141.

is waived. *See Active Fire Sprinkler Corp. v. United States Postal Serv.*, 811 F.2d 747, 754 (2d Cir. 1987) ("Any equitable rights held by subcontractors as against USPS [United States Postal Service], which may have been unenforceable where sovereign immunity existed, became enforceable upon immunity being waived."); *Kennedy Electric Co., Inc. v. United States Postal Service*, 508 F.2d 954 (10th Cir 1974); *Wright v. United States Postal Service*, 29 F.3d 1426 (9th Cir. 1994). This Court's decision in *Pearlman* has also formed the basis, in private contracting, for subrogation rights of unpaid subcontractors against retained funds held by the owner.[4]

In the decision below, for the first time, a court was called upon to consider whether such a suit could proceed using Section 702's waiver of immunity. In a limited holding, the Ninth Circuit held that, where the government pays funds to the primary contractor, after receiving protests from an unpaid subcontractor, Section 702 of the APA waives immunity for the subcontractor's claim to those specific funds. The decision below only applies where: (1) funds are still held by the government; and (2) the

4. Professor Dobbs describes these cases as follows:

> When the landowner has retained funds owing the general contractor for work completed, the subcontractor may sue the landowner demanding payment from the funds held by the landowner. He may legitimately claim against the funds on a theory of subrogation or simply by way of garnishment. The subcontractor's work in such a case has helped to create the landowner's debt to the general contractor, so the subcontractor may "stand in the shoes" of the general contractor to the extent he has not been paid [citing *Pearlman* and other cases].

3 D. Dobbs, *Law of Remedies* 470 (2d ed. 1993); *see also In re Modular Structures, Inc.*, 27 F.3d 72 (3rd Cir. 1994) (*Pearlman* doctrine not limited only to public contracts). See also pp. 19-22, *infra*, (discussing the government's concession that Blue Fox would have had an equitable lien if a private party, rather than a governmental agency, had contracted with Verdan)

government wrongfully pays out those funds over the unpaid subcontractor's protests.[5] If either element is missing, an equitable lien cannot be imposed.[6]

Because of the limited nature of the court of appeals' holding, the case below is not a strong candidate for review. There is no conflict in the case law on this subject. No circuit has expressly rejected the argument that, where immunity has been waived,

5. In this case, the Army continued to pay the defaulting primary contractor, Verdan, a total of $86,132.33, over a five month period after receiving written notice from Blue Fox that it was unpaid. Pet. App. 4a.

6. The Ninth Circuit's decision thus falls squarely within the rule as described by Professor Dobbs:

> The subcontractor's claim in such cases is limited. In the first place, it is not a claim against the landowner's general assets but only against the retained funds [citation omitted]; it cannot exceed the amount owed to the subcontractor, and it cannot exceed the amount of the funds held by the landowner. The landowner in such cases is not subjected to liability for more than he agreed to pay; his liability is merely redirected by the court. . . .

3 D. Dobbs, *Law of Remedies* 471 (2d ed. 1993).

Petitioner overlooks this point, characterizing the decision below as holding: "that the APA waives the Government's sovereign immunity for a subcontractor's claim for monies that a federal contractor should have paid, but did not pay. . . ." Petition at 11. See also Pet. App. 14a (Rymer J., dissenting) ("Never before has a court held that a subcontractor may sue an agency of the United States, which has not agreed to be sued, for contract monies that the prime contractor should have paid the prime contractor, but didn't.")

Both of these descriptions, which mistakenly describe the government's liability as consistent with that of an insurer for debts to unpaid subcontractors, overlook the fact that the subcontractor's claim is limited to the amount, if any, held by the owner after notice that the subcontractor is unpaid.

Pearlman obligates the government to hold remaining funds for the benefit of an unpaid subcontractor. Nor has any other court considered whether Section 702 waives immunity for the subcontractor's claim to specific funds.[7] Petitioner has failed to cite any case which holds that Section 702 does *not* waive immunity over such a suit. Indeed, in a closely analogous case, the Second Circuit has held that Section 702 *does* waive immunity over a surety's equitable claim to funds held by the government. *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475 (2nd Cir. 1995).[8] At this stage, it is premature to examine this issue. Respondent respectfully suggests that this Court wait to see if such a conflict ever develops.[9]

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7. Neither *Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287 (7th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985), nor *Automatic Sprinkler Corp. of America v. Darla Envtl. Specialists*, 53 F.3d 181 (7th Cir. 1995) considered an argument that, under *Pearlman*, the Government had a duty to hold funds for the benefit of an unpaid subcontractor. Moreover, neither case consider the question of whether Section 702 waived sovereign immunity for the subcontractor's claim.

8. *Aetna* involved a surety's suit for equitable subrogation. The District Court had denied Aetna's motion to amend its suit, originally brought under the Federal Tort Claims Act to plead an additional claim, under Section 702 of the APA, alleging that Aetna was aggrieved by the government's failure to pay over funds which it acquired by right of subrogation. 71 F.3d at 478. The District Court refused amendment for two reasons. First, it reasoned that the APA claim was contractual in nature, and not within the jurisdiction of the district courts. The court of appeals disagreed, stating that, under *Pearlman*, the right of subrogation was an obligation arising through operation of law, and not a claim founded on contract. 71 F.3d at 478. The District Court also denied Aetna's motion to amend because the claim sought money damages for which the APA did not provide immunity. The Second Circuit rejected this basis as well, holding that Aetna's claim for equitable subrogation was not a claim for "money damages" under the APA, but instead a claim "to compel the government to do its duty by paying over the funds owed to Aetna" which could proceed under Section 702. 71 F.3d at 478.

9. As of May, 1998, the Ninth Circuit's August 1997 opinion remains uncited by any court. *Shepards Federal Citations*, vol. 88 no. 9, May 1, 1998.

B. There Is No Conflict Whether § 702's Waiver Is Limited To Statutory Rights.

The other principal issue concerns whether, under this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), Section 702 waives immunity only for legal duties imposed by statute, but not for duties to pay money which arise independent of statute. As to this issue, Petitioner suggests that the decision below conflicts with *Hubbard v. Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc) and *Dia Navigational Co. v. Pomeroy*, 34 F.3d 1255 (3rd Cir. 1994). Neither case, however, concerns whether an unpaid subcontractor's claim for an equitable lien constitutes "money damages" under the APA.

1. The Government Conceded at Oral Argument That Bowen Is Not Limited To Statutory Rights

Even if Petitioner is correct that *Bowen* is limited to claims arising under statute, the government's attorney told the Ninth Circuit just the opposite during oral argument.[10] It follows that the

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10. The pertinent oral argument included the following:

Government Counsel:

> Now, on its face, the APA would seem to say you cannot get that kind of relief under the APA, but there are exceptions as recognized in *Bowen*, *Cal Almond* and those cases. If the person asserting the lien or the claim to the money can show an independent basis for the right to that money, a statute, a contract[,] by operation of law as a surety, then it's not money damages.
>
> * * *

(Cont'd)

(Cont'd)

Government Counsel:

> But they also have to prove though that they have a right to that money. And in the *Bowen* case the State of Massachusetts proved it had a right to the — to money because of a statutory right. In the *Pearlman* case, for example, the plaintiff there, the surety, proved that it had a right to the money by operation of law through the concept of subrogation. The plaintiff in this case, Blue Fox, cannot point to any independent substantive right that allows — that allows them to be paid by the government. I think that's — That's our position.

The Court:

> All right. The Massachusetts case [*Bowen*] was a statutory right case.

Government Counsel:

> It was.

The Court:

> There was not one single word in that opinion that says that the — the — the rulings in this are — are limited to statutory rights.

Government Counsel:

> That's true. And I would concede that rights could occur through a contract, which we don't have in this case, or through operation of law as we have in the suretyship cases.

Transcript of Oral Argument by Government Counsel (lodged with the Supreme Court Clerk) [hereinafter *Transcript*], at 12-14.

See also:

Government Counsel:

> Correct. But the subcontractor in this case, the plaintiff, has to

(Cont'd)

Ninth Circuit can scarcely be accused of committing reversible error in holding that "there is no requirement in *Bowen* or the APA" that the right to the money "be statutorily granted." Pet. App. 8a. See Petition at 16-17. The court merely applied the law as the government represented it to be.[11] Thus, the government has not only waived its principal basis for asserting a conflict among the circuits, but it has also waived the basis for its argument that the decision below permits an unauthorized expansion of the federal fisc.[12]

(Cont'd)

> show some entitlement by way of statute, contract or by operation of law. They have to show that they have a right to payment of money from the government.

Transcript, supra at 2.

11. The government's characterization of the law on this point has not remained consistent. In its brief to the Ninth Circuit, the government stated that "Under the *Bowen* analysis, a claimant may avail itself of § 702 when it seeks funds to which it is entitled by statute, as opposed to funds which cover the losses it suffered because the agency failed to do what it was required to so [sic]." Appellees' Opening Brief at 14, *Blue Fox, Inc. v. SBA*, 121 F.3d 1357 (No. 96-35648). During argument, however, the government attorney conceded that the *Bowen* rule was not limited to statutory claims, and acknowledged that the APA's waiver of immunity could also extend to claims "arising under operation of law as a surety." *Transcript, supra* note 10, at 14.

In its Petition to this Court, the Government now states that *Bowen* is limited *only to* claims involving statutory rights and, *for the first time*, argues that a failure to so limit *Bowen* would violate the Appropriations Clause of the Constitution. Petition at 28.

12. Petitioner states:

> Simply put, before the courts may order the payment of funds

(Cont'd)

2. The Ninth Circuit's Decision Does Not Conflict With the D.C. Circuit's Decision in Hubbard

Petitioner argues that this Court should grant certiorari to examine a conflict in analysis between the Ninth Circuit's decision below, and that employed by the D.C. Circuit in *Hubbard v. Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc).[13]

In *Hubbard*, the plaintiff never performed any work. His claim was for "loss of income attributable to Hubbard's being denied the

(Cont'd)

> from the Treasury as specific relief under the APA, they must — as in all other contexts — locate an Act of Congress entitling the plaintiff to that relief. That principle is consistent with *Bowen*, which held that relief was available under the APA only because the relief "enforce[d] [a] statutory mandate * * * which happen[ed] to be one for the payment of money."

Petition at 18-19.

However, on this record, that argument has been waived. The government *conceded* that the APA's waiver of immunity could extend to claims arising "through operation of law as we have in the suretyship cases." *Transcript, supra* note 10, at 14. The government also acknowledged that Blue Fox's equitable claim to the unpaid funds could not be defeated by the government paying out the funds after receiving notice from Blue Fox. See pp. 22-23, *infra*. The Ninth Circuit could properly conclude, therefore, that the funding sources available to pay a surety whose equitable subrogation claim was wrongfully disregarded would also be available to pay respondent's claim. *See* majority opinion at 12a, *citing Transamerica Premier Ins. Co. v. United States*, 32 Fed. Cl. 308, 314 (1994).

13. The issue in *Hubbard* was whether the plaintiff, whom EPA had wrongfully failed to hire, was entitled to receive back pay along with instatement as part of an equitable remedy. Relying on this Court's decision in *Bowen*, and on other cases that have categorized back pay as equitable relief, a split panel of the D.C. Circuit concluded that back pay fell within the waiver of immunity for "relief other than money damages" in Section 702. The *en banc* court found that Hubbard could not receive back pay because Congress had not expressed an unequivocal intent to waive sovereign immunity for such relief.

job, . . ." 982 F.2d at 533. The court noted the result may well have been different had the plaintiff performed work for which he was not paid:

> We do not suggest that back pay must always be viewed as money damages and can never be properly categorized as specific relief. *If Hubbard had been hired by the EPA and worked for the agency for a year without being paid, his legal claim might well be viewed differently. In that case, the money that Hubbard had a right to receive in exchange for his labor might well be the very thing that was taken from him.*

982 F.2d at 533, n.4 (emphasis supplied).[14]

By contrast, Blue Fox *earned* its money, by performing work for which it was never paid. Unlike Hubbard's request for unearned money, Blue Fox's quest was for "the very thing to which it was entitled." 982 F.2d at 533, n.4. Thus, no factual parallel exists between *Hubbard* and *Blue Fox*.

The two cases are also legally distinguishable. Petitioner's principal objection relates to a supposed conflict in "analysis" between the decision below and *Hubbard*.[15] However, this

14. In like manner, the focus of Judge Randolph's concurring opinion (in which then Circuit Judge R.B. Ginsburg joined) was that Hubbard lost *the opportunity* to earn wages (as opposed to the wages themselves). The concurring opinion's first sentence summarized its rationale: "If Hubbard prevails, the Government will have to pay him money to make up for *wages he never earned*." (emphasis supplied).

15. Petitioner states that *Hubbard* "reject[ed] analysis indistinguishable from that employed by the Ninth Circuit below . . .", Petition at 14, and that "[t]he Ninth Circuit's reasoning is, by contrast, indistinguishable from that adopted by the dissenting opinion in *Hubbard*." Petition at 16, n.6. See also Petition at 11 ("Broadly construed, the Ninth Circuit's decision allows the APA to be used to justify monetary recovery against the Government for tort-type or contract-type injuries whenever the requested remedy can be labeled 'equitable.' ")

argument, which posits an equitable lien to be a compensatory device lurking behind an equitable label, misapprehends the nature of the remedy. An equitable lien is imposed on existing contract funds, and is limited to the amount of money, if any, held by the owner. See p. 7, n.6, *supra*. Inasmuch as compensation from separate funds is not involved, no "money damages" are being sought. *Hubbard* is not to the contrary. The recurring theme of both the majority and concurring opinions in *Hubbard* was that the plaintiff never performed any work, and to award him money was to compensate him for his losses in being denied the job. In that sense, an "equitable" label was being attached to a compensatory device. In contrast, by performing work, Blue Fox qualified under *Hubbard*'s test for defining the types of "specific relief" for which the APA waives immunity. 982 F.2d at 533, n.4.[16]

3. The Ninth Circuit's Decision Does Not Conflict With the Third Circuit's Decision in Dia

In *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475 (2nd Cir. 1995), the government cited *Dia*, as it does to this Court, "for the proposition that a statutory duty to pay money is required if monetary relief is sought under the APA by means of an injunction against the agency." 71 F.3d at 479. As the Second Circuit stated:

> This misreads *Dia*. The court therein recognized that such monetary relief would be available regardless whether the duty to pay arose from statute or from

16. The absence of any important conflict becomes further apparent when one considers that the Second Circuit, in two decisions construing the APA, has adopted *both* of what Petitioner suggests are "conflicting" approaches. In *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994), the Second Circuit, citing *Hubbard*, held that "[b]ack pay, as a claim for damages, falls outside the scope of the APA." Shortly thereafter, the Second Circuit decided *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475 (2nd Cir. 1995), which held that a surety's claim for equitable subrogation does not present a claim for "money damages" under Section 702.

> regulation. What the court refused to do was to usurp the agency's power to make rules under the statute. Thus *Dia* contradicts the Government's position, as it reasoned that a statutory duty was not necessary to such a money award. We see no reason why the duty to pay money should not be equally enforceable under the APA regardless whether the duty arises by statute, regulation, or operation of law.

71 F.3d at 479.

Although the government has attempted to limit *Bowen* to claims asserting statutory rights, courts have been reluctant to accept this argument. Petitioner has thus failed to demonstrate that an important conflict exists such as would warrant this Court's attention. *Bowen*'s holding, which has yet to spawn significant conflicting interpretations, and which Congress has left alone, should not be disturbed. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("... we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.")

II.

THE CASE BELOW DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR EXAMINING THE APPROPRIATIONS CLAUSE ISSUE.[17]

Petitioner argues that the Ninth Circuit's decision is inconsistent with this Court's decision in *Office of Personnel Management v. Richmond*, 496 U.S. 432 (1990). Petition at 18-19. *Richmond*

17. The Government failed to present the Appropriations Clause issue to the lower courts. Accordingly, it should not be considered. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

and its progeny stand for the proposition that federal courts may not force federal agencies to overreach their statutory authority in paying relief out of the public fisc. In *Richmond*, to award respondent the relief he requested would be to force the government, because of misstatements by a benefits eligibility counselor, to pay the respondent funds that Congress had specifically rendered unavailable to persons at his income level. Congress had amended the statute to deny eligibility to persons in Mr. Richmond's position. For the agency to pay Mr. Richmond would violate specific statutory instructions.

This case is fundamentally different from *Richmond*. The government has failed to identify a statute that prohibits the government from paying the relief that the court awarded to respondent. Because the agency is not being asked to act in conflict with any specific statute, the Appropriations Clause issue is not presented.

There should be no adverse fiscal consequences to the United States from the decision below. To prevent similar claims, all the government need do is comply with the Miller Act bond requirements. If they do, there will never again be a similar claim. Thus, there are not substantial adverse consequences to the United States from this decision. To the extent claims do arise, the government can obtain the money to pay unpaid subcontractors from the same sources used when the government is held to pay twice when it disregards the subrogation rights of sureties, or fails to pay the proper party when acting as stakeholder.[18]

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18. *See Transamerica Premier Ins. Co. v. United States*, 32 Fed. Cl. 308, 314 (1994); *Newark Ins. Co. v. United States*, 169 F. Supp. 955 (Ct. Cl. 1959); *Home Indemnity Co. v. United States*, 376 F.2d 890 (Ct. Cl. 1967); *International Fidelity Ins. Co. v. United States*, 25 Cl. Ct. 469 (1992); *National Surety Corp. v. United States*, 319 F. Supp. 45 (N.D. Ala. 1970).

III.

THE CASE BELOW OTHERWISE PRESENTS AN INAPPROPRIATE VEHICLE FOR REVIEW.

A. The Decision Below Is Further Limited To The Rare Instance Where the Miller Act Bonding Scheme Has Failed.

The purpose of the Miller Act "is to protect those who would have materialmen's and workmen's liens under state law if they were not working on a structure exempt as a federal public work or building." Pet. App. 3a, *quoting United Bonding Ins. Co. v. Catalytic Constr. Co.*, 533 F.2d 469, 473 (9th Cir. 1976).

The government has conceded that a Miller Act bond should have been furnished, but was not in this case. Pet. App. 3a. Had a bond been furnished, Blue Fox would have been paid by the Miller Act surety, and this case would never have arisen. Indeed, it was only through misfeasance by government officials that this case ever arose. See Statement, pp. 2-3, *supra*. A case which, by definition, arises only when federal officials fail their duty under law, cannot be said to present a situation likely to recur. This Court should not expend its limited resources to resolve a question that arises only when the federal government fails to comply with federal law.

B. Review May Have the Inadvertent Effect of Disturbing Established Commercial Practices Based Upon This Court's Decision in *Pearlman*.

If this Court grants certiorari, an issue will be whether an equitable lien on these facts constitutes "money damages" or "specific relief." To answer that question, the parties and the Court may be called upon to closely examine the historical roots of the rights to the money claimed. *See Bowen*, 487 U.S. at 893-901;

Hubbard, 982 F.2d at 537-539. Particular attention will have to be paid to this Court's precedents in *Prairie State Bank v. United States*, 164 U.S. 227 (1896); *Henningsen v. United States Fidelity & Guaranty Company*, 208 U.S. 404 (1908); *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947) and *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962).

These cases form the basis for settled rules for resolving conflicting claims to construction contract balances. *See* Brady, *Bonds on Federal Government Construction Contracts: The Surety's View*, 46 N.Y.U. L. Rev. 262, 269-76 (1971); Bednar, et al., *Construction Contracting* (George Washington Univ. 1991), "Priorities to Retained Funds," at 1334-1351. If this Court were to determine that an equitable lien constitutes "money damages" under the APA, such a result could be interpreted as inconsistent with *Pearlman*'s premise that "laborers and materialman had a right to be paid out of the fund. . . ." 371 U.S. at 141. To the extent the *Pearlman* rule were undermined, settled rules which have become an accepted part of construction law for decades may be called into question. Such an inadvertent result could have adverse effects for the surety industry as well.[19] Moreover, if the *Pearlman* doctrine

19. As one commentator has noted:

> . . . the surety nevertheless must continue to have precedence to the contract funds upon the default of the contractor, not only as a matter of fundamental equity (it seems unassailable that one who pays on behalf of another *should* acquire the rights of those it pays) but also as a matter of fundamental economics. Contrary to widespread misunderstanding, "[t]he business of a construction contract surety is not one of ordinary insurance, for the risk is not actuarially linked to premiums, nor is there a pooling of risks." *National Shawmut Bank v. New Amsterdam Cas. Co.*, 411 F.2d 843, 845 (1st Cir. 1969). Construction contract suretyship is premised to a considerable extent on the surety's rights in the contract fund. Any loss or diminution of this security could have serious consequences for the surety industry.

Brady, *Bonds on Federal Government Construction Contracts: The Surety's View*, 46 N.Y.U. L. Rev. 262, 279 (1971) [emphasis in original]

were undermined, the effect could be increased cost to the taxpayers for all construction contracts.[20] *See also Payne v. Tennessee*, 501 U.S. 808, 828 (1990) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved. . . .")[21]

C. The Issues Have Been Inadequately Preserved.

Finally, this case presents a poor vehicle for review because significant issues raised in the Petition were inadequately preserved, or else waived, in the courts below. As discussed above, the government preserved neither the Appropriations Clause issue, nor the issue regarding *Bowen*'s limitation to statutory rights. See pp. 9-11, *supra*.

Other concessions make this case a poor candidate for review. The government conceded to the Ninth Circuit that Blue Fox would have an equitable lien if a private party, rather than a government agency, had been involved.[22] As the Ninth Circuit wrote:

20. Because sureties on public contracts have subrogation rights in retained funds, which under *Pearlman*, *Henningsen* and *Prairie State Bank* take precedence over rights of competing lenders, sureties do not have to rely solely on premiums to make up their losses. *See* Brady, *Bonds on Federal Government Construction Contracts: The Surety's View*, 46 N.Y.U.L.Rev. 262, 269-76 (1971). Absent the protection afforded by *Pearlman*, sureties may be forced to raise premiums, which would be passed through in the form of higher overall bid prices on all public construction projects.

21. *See also* Franks and Evans, *A Defense of Established Landmarks: Claims of Construction Sureties to Contract Funds Under Chapter 11*, 25 Tort & Ins. L.J. 28 (1989).

22. The pertinent oral argument was as follows:

The Court:

> Let's suppose it were a private party in the position of the government.

(Cont'd)

(Cont'd)

Government Counsel:

I'm sorry. I didn't hear you.

The Court:

If it were a private party —

Government Counsel:

Yes.

The Court:

— in the position of the government, would the subcontractor have an equitable lien against the retainage?

Government Counsel:

Yes.

The Court:

All right.

Government Counsel:

I think the right case —

The Court:

So the only reason you say that the private party here wouldn't have an equitable lien against the government is sovereign immunity because they're seeking damages instead of an equitable lien?

Government Counsel:

Yes. That's our position.

Transcript, supra note 10, at 4-5.

(Cont'd)

> The Army has conceded that Blue Fox would have an equitable lien claim, *i.e.*, a non-damages claim, if a private party, rather than a government agency had contracted with Verdan. The fact that the Army is the defendant does not change the nature of the claim, but only requires analysis of the Army's immunity.

Pet. App. 8a.

By conceding the existence of an equitable lien under private circumstances, the government acknowledged that Blue Fox had equitable rights (whether or not enforceable) in the specific funds which were eventually paid to Verdan. If held to this concession, the Army should be precluded from arguing to this Court that the relief Blue Fox received is anything other than specific. Assuming that Blue Fox had rights in the specific monies which were paid to Verdan, it becomes difficult to characterize the relief as "damages" (*i.e.*, compensation for a loss suffered) as opposed to specific relief (*i.e.*, "the very thing to which he was entitled.") 487 U.S. at 895.

Additionally, the government conceded at oral argument that equitable rights cannot be defeated by paying out funds after receiving notice that the funds were encumbered.[23] Citing *City of*

(Cont'd)

See also:

The Court:

I thought that a private party would have an equitable lien against another private party.

Government Counsel:

Yes.

Transcript, supra note 10, at 13.

23. The pertinent oral argument was as follows:

(Cont'd)

Houston v. HUD, 24 F.3d 1421, 1424 (D.C. Cir. 1994), Petitioner states

> the D.C. Circuit held that once the *specific funds* sought by the plaintiff had been spent, obligated or otherwise exhausted, an award of money from any other source would constitute a prohibited award of money damages.

Petition at 17, n.8. Irrespective of its merits otherwise, however, this argument has been waived. *See also Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475, 479 (2nd Cir. 1995)

(Cont'd)

The Court:

> Could — If they did have an equitable claim to the unpaid funds as of that time, can that be defeated by the government then paying that money out after notice and then saying well, there's no longer any money available?

Government Counsel:

> No. I think there that some of the cases we have cited to you, the government does run a risk if they ignore a demand, for example, of a surety. All of these cases that have been cited by the plaintiff involve sureties, —

The Court:

> Yes.

Government Counsel:

> — who paid. Once — Once they are on notice that a surety has, for example, paid the — the subcontractors, for example, once the government's on notice, then if the government goes ahead and pays contract funds to the defaulting general contractor, then they run the risk of paying twice.

Transcript, supra note 10, at 7-8.

("[I]f an agency has a legal obligation to pay money to a party, that duty does not disappear simply because the money was paid in error to the wrong person.")

Also, the government failed to preserve the argument, appearing at page 27, note 16 of the Petition, that relief is unavailable under Section 702 because another statute "impliedly forbids" such relief. That argument was neither presented to, nor passed on, by the courts below, and should not be considered by this Court. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

THOMAS F. SPAULDING
Counsel of Record
SPAULDING COX & SCHAEFFER, LLP
Attorneys for Respondent
1205 N.W. 25th Avenue
Portland, Oregon 97210-2497
(503) 222-3815

APPENDIX

APPENDIX A — TRANSCRIPT OF ORAL ARGUMENT BY GOVERNMENT COUNSEL

(Omitted here but submitted separately as Lodging Appendix.)

Supreme Court, U.S.
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No. 97-1642

In the Supreme Court of the United States

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
PETITIONER

v.

BLUE FOX, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The question presented in this case is whether 5 U.S.C. 702, which waives the United States' immunity to suits challenging "agency action" except suits for "money damages," permits a party to seek a monetary award from the government simply because the relief can be characterized as "equitable" rather than "legal" in nature. Because the decision below answers that question in the affirmative, it conflicts with decisions of the District of Columbia and Third Circuits construing Section 702, and with numerous other decisions holding that a subcontractor cannot recover directly from the government. Given the substantial federal and fiscal interests implicated by those conflicts, this Court should grant certiorari to resolve them.

A. Respondent does not dispute that the Ninth Circuit below read 5 U.S.C. 702 and this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), as declaring that the United States has waived its immunity to suits seeking monetary awards whenever the cause of action or remedy can be characterized as "equitable" in nature. Pet. App. 8a-9a ("Since the APA waives immunity for equitable actions, the district court had jurisdiction under the APA."); *id.* at 10a ("[S]uch equitable liens are properly

characterized as equitable remedies, rather than money damages."); see Pet. 8-9. Nor does respondent deny that the D.C. Circuit, in *Hubbard* v. *Administrator, EPA*, 982 F.2d 531 (1992), rejected precisely that position. *Id.* at 537 ("What may qualify as an 'equitable remedy' * * * is not synonymous with specific relief" permitted by 5 U.S.C. 702.); *id.* at 539 (Randolph, J., joined by R.B. Ginsburg, J., concurring) ("[T]he line section 702 draws is not between actions at law and suits in equity."); see Pet. 15-16.

Likewise, respondent does not deny that the Ninth Circuit in this case—following *Aetna Casualty and Surety Co.* v. *United States*, 71 F.3d 475, 479 (2d Cir. 1995)—held that 5 U.S.C. 702 permits monetary awards against the government in the absence of any statutory right to payment. Pet. App. 7a-8a ("there is no requirement in *Bowen* or the APA" that the right to the money "be statutorily granted"). In contrast, consistent with the Appropriations Clause of the Constitution, Art, I, § 9, Cl. 7, and this Court's decision in *OPM* v. *Richmond*, 496 U.S. 414 (1990), the D.C. Circuit and the Third Circuit have held that a money judgment is permitted by Section 702 only if the suit seeks to enforce a statute entitling the plaintiff to money from the government. See Pet. 14-15, 18 (citing *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1267 (3d Cir. 1994), and *Hubbard*, 982 F.2d at 536).

1. Respondent attempts to reconcile the decision below with *Hubbard* by relying on a footnote in which *Hubbard* suggests that, if the *Hubbard* plaintiff had sought payment for work performed as an employee of the United States—rather than "back pay" for wrongful denial of employment—his claim might have constituted a suit for "specific relief" rather than a "money damages" action barred by Section 702. Br. in Opp. 13 (quoting 982 F.2d at 533 n.4). Respondent thus argues that the decision below is consistent with *Hubbard* because respondent, like the hypothetical employee addressed in the *Hubbard* footnote, "*earned* its money, by performing work for which it was never paid." *Ibid.*

That argument does not reconcile the cases. It does not change the fact that the D.C. Circuit flatly rejected the very proposition the Ninth Circuit adopted as its holding below—that monetary relief ceases to be "money damages" barred by 5 U.S.C. 702 whenever the cause of action or remedy can be characterized as "equitable" rather than "legal." See *Hubbard*, 982 F.2d at 537. Moreover, respondent's claim would fail under *Hubbard* because respondent, unlike the hypothetical employee discussed in footnote 4 of *Hubbard*, can point to no statute that even arguably entitles it to money from the government. Compare *Hubbard*, 982 F.2d at 536 (non-employee's monetary claim fails because it does not seek "enforcement of [a] legal mandate that the [agency] pay him a sum of money"), with 5 U.S.C. 5332(a)(1) ("Each [federal] employee * * * *is entitled* to basic pay in accordance with the General Schedule." (emphasis added)); cf. *United States* v. *Testan*, 424 U.S. 392, 402 (1976) (federal employee "is entitled" by statute "to the emoluments of his position," but not to pay for a promotion he did not receive).

Respondent's attempted reconciliation also fails because, in conflict with *Hubbard*, the decision below fundamentally misapplies *Bowen*'s distinction between the "specific relief" that 5 U.S.C. 702 permits and the "money damages" awards it prohibits. Pet. 14-15, 19-21. Following *Bowen*, 487 U.S. at 895, the D.C. Circuit has recognized that relief is "specific" and thus not "money damages" only if it gives the plaintiff "the very thing to which [he is] entitled" from the government, *i.e.*, it forces the government to fulfill the specific legal duty to the plaintiff that the government breached. Because "[t]he only 'entitlement' that the [government] deprived" the *Hubbard* plaintiff of "was the job offer he [otherwise] would have received" from the government, the D.C. Circuit held that "[i]nstatement is the specific relief for that deprivation," as "it gives [plaintiff] 'the very thing' he was owed." 982 F.2d at 533. Back pay, in contrast, constitutes "money damages" because it is a substitute remedy that compen-

sates the plaintiff for a consequential "loss of income attributable" to agency action. *Ibid.*[1]

In this case, the "only 'entitlement' that the [Army] deprived" respondent of (if any) was the posting of a bond under the Miller Act, 40 U.S.C. 270a-270d; respondent's contractual right to *payment* ran against the prime contractor, not the Army. Pet. 20-21. Consequently, a suit for "specific relief" to obtain "the very thing to which [respondent] was entitled" from the Army could demand only that which the Miller Act mandated, *i.e.*, that the Army require the posting of a bond from a qualified surety. Because the Ninth Circuit instead awarded respondent monetary relief against the Army, its decision cannot be reconciled with *Hubbard*. See also *Department of the Army* v. *FLRA*, 56 F.3d 273, 276 (D.C. Cir. 1995) (successful challenge to agency action for failure to provide required notice entitles employees only to "specific relief" in the form of proper notice, since "proper notice," not greater compensation, "was the thing to which * * * employees were entitled").

2. Respondent's effort to reconcile this case with the Third Circuit's decision in *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1267 (1994) (see Pet. 15-17), fares no better. Respondent is correct that, under *Dia*, Section 702 might be read as authorizing monetary relief when necessary to enforce a statute *or* an agency regulation creating a right to payment from the government. Br. in Opp. 14-15 (quoting *Aetna*, 71 F.3d at 479); see *Dia*, 34 F.3d at 1267. But it does not follow that the Third Circuit would permit monetary awards based solely on equitable claims, as the Ninth Circuit did below. To the extent agency regulations requiring monetary payments may be judicially enforced consistent with 5 U.S.C. 702 and the Appropriations

[1] See also 982 F.2d at 539 (Randolph, J., joined by R.B. Ginsburg, J., concurring) ("The suffered loss here is not wages, but the chance to earn them. Money substitutes for that loss. The back-pay award Hubbard seeks therefore constitutes 'money damages' within the meaning of 5 U.S.C. § 702.").

Clause, it is because valid regulations have the force and effect of statutory law. *Atchison, T. & S. F. Ry.* v. *Scarlett*, 300 U.S. 471, 474 (1937) (regulation has "the same force as though prescribed in terms by the statute"). In any event, the Third Circuit, like the D.C. Circuit, has recognized that a "substitute" remedy such as that awarded by the Ninth Circuit here is inconsistent with the "money damages" prohibition in 5 U.S.C. 702. See *Dia*, 34 F.3d at 1267 (where wrong is failure to promulgate regulations properly, monetary award is "a substitute for what ought to have been done, and therefore would constitute money damages").[2]

3. Finally, respondent does not dispute that the Ninth Circuit's decision, because it requires the Army to make payments despite the exhaustion of project funds, see Pet. App. 11a-12a, conflicts with the D.C. Circuit's decision in *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (1994). See Pet. 17 n.8. Instead, respondent relies on a waiver argument that is, as discussed below, without merit.

B. Respondent's remaining arguments in opposition to certiorari are also without merit.

1. Although respondent concedes that the Army consistently has argued that this suit is barred by 5 U.S.C. 702, respondent contends that the Army, during oral argument before the Ninth Circuit, waived some of the specific points made in the petition. Br. in Opp. 9-11, 19-22 & nn.10, 12, 23. The contention lacks substance for two reasons.

[2] Respondent also suggests that there is no conflict because this case, unlike *Hubbard* and *Dia*, deals with subcontractors. See Br. in Opp. 3, 6. Respondent, however, fails to explain why that distinction makes a difference. In this case, *Dia*, and *Hubbard*, the question was whether a suit for a monetary recovery is consistent with 5 U.S.C. 702. The Ninth Circuit below answered that question in the affirmative, despite the absence of a statutory right to payment, simply because the remedy could be given an "equitable" label. In *Dia* and *Hubbard*, the Third and D.C. Circuits rejected that argument, and held that the United States is immune to suits seeking money in the absence of a statutory entitlement to specific funds. The differing identities of the plaintiffs does not make the conflict less palpable or worthy of review.

First, the immunity of the United States cannot be altered by a lawyer's concessions; it can be waived only by an Act of Congress. See, *e.g.*, *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); see also *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983) (waiver of immunity must be enacted by Congress). In fact, sovereign immunity is sufficiently "jurisdictional in nature," *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), that the issue itself—and thus *a fortiori* individual arguments in support thereof—can be raised for the first time on appeal. See *Finn*, 123 U.S. at 232; cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal" (internal quotation marks omitted)).

Second, review of the entire argument transcript reveals that—despite respondent's selective quotations—no waiver occurred. The Army never conceded that Section 702 permits monetary awards after project funds are exhausted;[3] and it did not concede that Section 702 would

[3] The portion of the transcript quoted by respondent (Br. in Opp. 21-23 & n.23) addresses the fact that, as a matter of substantive *lien law*, the payment of funds to one party does not eliminate the lien in favor of another. Regardless of what substantive lien law provides, the Army has consistently maintained that *Section 702* precludes such liens from being imposed on government funds once project funds are exhausted. Indeed, immediately after the exchange cited by respondent (Br. in Opp. 21-22 n.23), the Ninth Circuit panel inquired why the equitable lien rule, which permits liability after fund depletion, does not control this case. Counsel for the government responded: "This is different because all of the money that was due to the general contractor * * * w[as] paid * * *. Verdan did not have a right to [any] money [and] neither did the subcontractor, Blue Fox." Tr. 8. The discussion continued: "Court: * * * I thought your answer was going to be because of the immunity issue. Government Counsel: Well, that is my point. The plaintiff, Blue Fox, did not have any right to any money in the hands of the government." Tr. 8-9; see also Tr. 2. That position is consistent with the law in other circuits. See, *e.g.*, *City of Houston*, 24 F.3d at 1428 (because suit under 5 U.S.C. 702 must seek the "very thing" to which the plaintiff is entitled, exhaustion of the

permit an award here in the absence of a statutory entitlement.[4] Moreover, the Ninth Circuit—far from finding waiver—reached the merits of each argument presented in the certiorari petition. See Pet. App. 7a-8a (holding that money-payment mandating statute is not necessary); *id.* at 11a-12a (holding that respondent may recover despite exhaustion of project funds); *id.* at 8a-11a (holding that suit is not for "money damages" even though the duty the Army breached was not for the payment of money to respondent). Because those issues were not only presented to the Ninth Circuit but actually decided by it, they are properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992) (review proper if the issue was presented *or* reached by the court below); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991) (rejecting waiver argument because the court of appeals "decided the * * * issue").[5]

specific funds to which the plaintiff claims an entitlement precludes the entry of a monetary award; funds from any other source would be a "substitute" remedy and thus "money damages").

[4] Respondent concedes that the Army's Ninth Circuit brief argued this point with clarity, insisting that Section 702 does not permit the imposition of monetary liability in the absence of a money-payment mandating statute. Br. in Opp. 11 n.11 (quoting Gov't C.A. Br. as asserting that "a claimant may avail itself of § 702 when it seeks funds to which it is entitled by statute, as opposed to funds which cover the losses suffered because the agency failed to do what it was required to [d]o"). Although the oral argument transcript is not a model of clarity with respect to this issue, the Army never abandoned the position it took in its brief. See Tr. 2-3 ("Now, if there w[ere] a statute, for example, such as * * * in *Bowen*, there the State of Massachusetts had a right to the particular fund because of a statutory entitlement."). At most, the attorney conceded that other cases had permitted monetary relief in favor of sureties under a subrogation theory, see Tr. 7 ("All of these cases that have been cited by the plaintiff involve sureties."), but he clearly insisted that those cases were inapplicable here, Tr. 7, 8, 9-10.

[5] Respondent also appears to suggest (Br. in Opp. 11 n.11) that any arguments based on the Appropriations Clause are not properly before the Court. The proper construction of 5 U.S.C. 702 is before the Court, however, and it must be construed in a way that is consistent with the

2. Citing decisions of this Court involving subrogation and materialmen's liens, Br. in Opp. 4-6 & nn.1-3, respondent implies that this Court already has authorized recovery against the government in these circumstances. Respondent also suggests that review by this Court could adversely affect those doctrines, and thus commercial relations as well. See *id.* at 17-19. Those submissions are baseless. None of the Court's lien or subrogation decisions has any bearing on the waiver of immunity contained in 5 U.S.C. 702, as they deal exclusively with contests between private parties where the government had disavowed any right to the claimed funds; they thus nowhere hold "that laborers and materialmen ha[ve] any right against the United States." *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 143 (1962) (Clark, J., concurring).[6]

Appropriations Clause. Pet. 18-19. Respondent's further suggestion (Br. in Opp. 16) that the Appropriations Clause is not implicated because there is no statutory *prohibition* against the judgment in its favor reverses the controlling rule. The Appropriations Clause prohibits any disbursement of funds from the Treasury except as affirmatively authorized by "the express terms of a specific statute." *Richmond*, 496 U.S. at 432; see, *e.g.*, *City of Houston*, 24 F.3d at 1428 (where appropriated funds are already exhausted, monetary award would be barred by Section 702 as "money damages").

[6] As explained in the certiorari petition (at 21-22 n.11), sovereign immunity issues did not arise in *Pearlman*, *supra*, and *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U.S. 404 (1908), because the government was not a defendant; it had disavowed any claim to the money and paid it over voluntarily. Nor does *Prairie State Bank* v. *United States*, 164 U.S. 227 (1896) (cited at Br. in Opp. 4, 18), help respondent. That case arose in the Court of Claims—which was authorized to award money damages against the United States—and involved voluntary relinquishment of funds by the United States in any event. See 164 U.S. at 228-230; *Hitchcock* v. *United States*, 27 Ct. Cl. 185, 201 (1892); see also *id.* at 211 (Nott, J., dissenting) ("These cases involve no question of liability on the part of the Government [and instead] relate simply to the distribution of the fund * * * the Government * * * brought into court by bill of interpleader."). Respondent's further reliance on lower court cases involving subrogation by sureties (Br. in Opp. 16 n.18) is likewise misplaced; those cases too arose in contexts where money damages awards are permitted, such as

Likewise, the question before the Court in this case has no bearing on the law of equitable liens and subrogation in other settings. We may assume, *arguendo*, that, under circumstances like those present here, courts would permit an action against a private defendant.[7] Because the defendant in this case is a government agency, however, respondent can obtain no rights against the agency with respect to agency funds absent a waiver of immunity and a substantive right to payment. As we have explained, 5 U.S.C. 702 does not provide the requisite waiver of sovereign immunity (see Pet. 18-21), and the Miller Act does not give subcontractors the substantive right to recover money directly from the government (see Pet. 22-27). The Court's resolution of this case therefore is unlikely to have any (much less a sweeping) effect on equitable lien or subrogation law in other settings.

3. The Ninth Circuit's decision, in contrast, has sweeping repercussions for government contracting and the national fisc. Pet. 27-28. Although subcontractors have attempted to bring suit against the United States for decades, it long has been settled that sovereign immunity precludes such actions. See Pet. 22-27 (citing cases from this Court, the Court of Claims, as well as the Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits). The decision below thus conflicts not only with the decisions of the D.C. Circuit and Third Circuit in *Hubbard* and *Dia*, see pp. 1-5, *supra*, but also with longstanding precedent specifically relating to subcontractors on government con-

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in the Court of Federal Claims (or its predecessors), or in United States District Court under the Little Tucker Act, 28 U.S.C. 1346(a)(2).

[7] Respondent argues (Br. in Opp. 19-21) that, because an equitable lien would be enforceable against a private party, the lien must be "specific relief" rather than "money damages" under Section 702. The argument is without merit. Sovereign immunity and the Miller Act preclude any doctrine (equitable or otherwise) from giving respondent rights in agency funds vis-a-vis the agency itself; and they likewise bar judicial enforcement of respondent's claim to such a right. Neither respondent's claim to Army funds, nor its effort to enforce that claim, falls within the waiver of immunity in 5 U.S.C. 702.

tracts. See Pet. App. 14a ("Never before has a court held that a subcontractor may sue an agency of the United States, which has not agreed to be sued, for contract monies that the prime contractor should have paid to the subcontractor but didn't." (Rymer, J., dissenting)).

It is no answer to assert (Br. in Opp. 16) that the United States can avoid liability by requiring Miller Act bonds when the law so demands. If it had been Congress's desire that the government avoid "money damages" awards only through perfect legal compliance, Congress would have abrogated sovereign immunity entirely. Section 702, of course, does no such thing. Moreover, it is far from clear that the Ninth Circuit's decision can be limited to the Miller Act context. See *Tucson Airport Auth.* v. *General Dynamic Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (following decision below in a case not involving the Miller Act). Indeed, to the extent that the decision below permits suits to be brought to remedy tort-type injuries whenever the relief or action can be characterized as "equitable," it exposes the United States to liability that previously had been limited or nonexistent. Pet. 27-28. Because the imposition of such an unprecedented and unpredictable financial burden on the United States Treasury is fundamentally inconsistent with the terms and intent of Section 702—and because the Ninth Circuit's decision imposing that burden conflicts with the decisions of other courts of appeals—review by this Court is warranted.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

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No. 97-1642

In the Supreme Court of the United States

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
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v.

BLUE FOX, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

THOMAS F. SPAULDING
Counsel of Record
Spaulding Cox & Schaeffer, LLP
1205 N.W. 25th Avenue
Portland, Oregon 97210-2497
(503) 222-3815

Attorneys for Respondents

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
Attorneys for Petitioner

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 3:95cv612

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY,
DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/11/95	1	COMPLAINT (Cause Code: 28:1331) (Receipt # 155353) (tely) [Entry date 05/12/95]
5/11/95	2	SUMMONS ISSUED to Janet Reno (tely) [Entry date 05/12/95]
5/11/95	3	SUMMONS ISSUED as to Defendant Small Business Admin thru Carol Colpitts (tely) [Entry date 05/12/95]
5/11/95	4	SUMMONS ISSUED as to Defendant US Army thru Mary Ann Keyser (tely) [Entry date 05/12/95]

DATE	DOCKET NUMBER	PROCEEDINGS
5/11/95	5	SUMMONS ISSUED to US Attorney Kristine Olson (tely) [Entry date 05/12/95]
5/11/95	6	ORDER Discovery Schedule discovery ddl set for 9/8/95 pretrial order deadline set for 10/10/95 (tely) [Entry date 05/12/95]
7/11/95	7	MOTION by Defendants' TO EXTEND TIME TO ANSWER COMPLAINT TO 7/21/95 (tely)
7/12/95	8	RECORD OF ORDER by Honorable Helen J. Frye GRANTING Defendants MOTION TO EXTEND TIME TO ANSWER COMPLAINT TO 7/21/95 [7-1] (counsel notified) Court Rptr none (tely)
7/21/95	9	ANSWER by Defendants Small Business Admin, US Army to complaint [1-1] (tely) [Entry date 07/24/95]
9/7/95	10	MOTION by Plaintiff Blue Fox Inc TO EXTEND DISCOVERY AND PRETRIAL ORDER DEADLINES (tely)
9/11/95	11	RECORD OF ORDER by Honorable Helen J. Frye GRANTING Plaintiff's MOTION TO EXTEND DISCOVERY AND PRETRIAL ORDER DEADLINES [10-1]. Discovery ddl set for 10/10/95 & pretrial order ddl set for 11/10/95 (counsel notified) Court Rptr none (tely) [Entry date 09/12/95]

DATE	DOCKET NUMBER	PROCEEDINGS
10/10/95	12	MOTION by Defendants Small Business Admin, & US Army FOR EXTENSION OF TIME to 10/10/95 to file motions. CERTIFICATE OF SERVICE. (gam) [Entry date 10/12/95]
10/12/95	13	MOTION by Plaintiff Blue Fox Inc TO EXTEND DISCOVERY AND PRETRIAL ORDER DEADLINES (peg) [Entry date 10/13/95]
10/13/95	14	RECORD OF ORDER by Honorable Helen J. Frye GRANTING Defendants MOTION FOR EXTENSION OF TIME to 10/13/95 to file motions [12-1] & GRANTING Plaintiff's MOTION TO EXTEND DISCOVERY AND PRETRIAL ORDER DEADLINES [13-1]. Discovery ddl set for 11/9/95; pretrial order ddl set for 12/11/95 & dispositive motions due 11/13/95 (counsel notified) Court Rptr none (tely) [Entry date 10/16/95]
11/9/95	15	MOTION by Plaintiff Blue Fox Inc TO EXTEND DISCOVERY AND PRETRIAL ORDER DEADLINES (tely)
11/13/95	16	RECORD OF ORDER by Honorable Helen J. Frye GRANTING Plaintiff's MOTION TO EXTEND DISCOVERY AND PRETRIAL ORDER DEADLINES [15-1]. Discovery ddl set for 1/8/96 & pretrial order ddl set for 2/8/96 (counsel notified) Court Rptr none (tely) [Entry date 11/14/95]

DATE	DOCKET NUMBER	PROCEEDINGS
2/9/96	17	RECORD OF ORDER by Honorable Helen J. Frye ORDER extending the time to lodged the Pretrial Order if it becomes necessary to 30 days after the Court's decision on SJ MOTION that the parties plan to file. (counsel notified) Court Rptr none (tely)
2/15/96	18	MOTION by Plaintiff Blue Fox Inc FOR SUMMARY JUDGMENT Oral Argument Requested (tely)
2/15/96	19	MEMORANDUM IN SUPPORT by Plaintiff Blue Fox Inc of MOTION FOR SUMMARY JUDGMENT [18-1] (tely)
2/15/96	20	STATEMENT OF FACTS by Plaintiff Blue Fox Inc in support of MOTION FOR SUMMARY JUDGMENT [18-1] (tely)
2/15/96	21	EXHIBITS TO PLAINTIFF'S MOTION FOR SJ [18-1] (tely)
2/20/96	22	RECORD OF ORDER by Honorable Helen J. Frye SETTING Plaintiff's MOTION FOR SUMMARY JUDGMENT [18-1] on oral argument calendar of 1:30 3/25/96 (counsel notified) Court Rptr none (tely) [Entry date 02/21/96]
2/26/96	23	MOTION by Defendants' TO EXTEND TIME TO 3/4/96 TO RESPOND TO DEFENDANTS MOTION FOR SJ [18-1] (tely)

DATE	DOCKET NUMBER	PROCEEDINGS
2/26/96	24	CERTIFICATE OF SERVICE of MOTION TO EXTEND TIME TO 3/4/96 TO RESPOND TO DEFENDANTS MOTION FOR SJ [18-1] [23-1] by Defendants' (tely)
3/1/96	25	RECORD OF ORDER by Honorable Helen J. Frye GRANTING Defendants MOTION TO EXTEND TIME TO 3/4/96 TO RESPOND TO DEFENDANTS MOTION FOR SJ [18-1] [23-1]. ORDER STRIKING Plaintiff's MOTION FOR SUMMARY JUDGMENT [18-1] from the 3/25/96 calendar. It will be reset once the Government files its response and/or motion for summary judgment (counsel notified) Court Rptr none (tely)
3/4/96	26	MOTION by Defendants' FOR SUMMARY JUDGMENT Oral Argument Requested (tely)
3/4/96	27	MEMORANDUM IN SUPPORT by Defendants of MOTION FOR SUMMARY JUDGMENT [26-1] & in opposition to Plaintiffs MOTION FOR SUMMARY JUDGMENT [18-1] (tely)
3/4/96	28	STATEMENT OF FACTS by Defendant in support of MOTION FOR SUMMARY JUDGMENT [26-1] (tely)
3/4/96	29	AFFIDAVIT by Defendants of Hildegard Choate MOTION FOR SUMMARY JUDGMENT [26-1] (tely)
3/4/96	30	DECLARATION by Defendants of Erlinda M Sawyers re MOTION FOR SUMMARY JUDGMENT [26-1] (tely)

DATE	DOCKET NUMBER	PROCEEDINGS
3/4/96	31	CERTIFICATE OF SERVICE of declaration [30-1], affidavit [29-1], statement [28-1], memorandum [27-1], MOTION FOR SUMMARY JUDGMENT [26-1] by Defendants' (tely)
3/7/96	32	RECORD OF ORDER by Honorable Helen J. Frye SETTING Defendants MOTION FOR SUMMARY JUDGMENT [26-1] & Plaintiff's MOTION FOR SUMMARY JUDGMENT [18-1] on oral argument calendar of 1:30 4/8/96 (counsel notified) Court Rptr none (tely) [Entry date 03/08/96]
3/18/96	33	MOTION by Plaintiff Blue Fox Inc TO EXTEND TIME TO FILE REPLY TO ITS MOTION FOR SJ [18-1] (tely)
3/25/96	34	RECORD OF ORDER by Honorable Helen J. Frye GRANTING Plaintiff's MOTION TO EXTEND TIME TO FILE REPLY TO ITS MOTION FOR SJ [18-1] [33-1]. ORDER extending deadline to file Plaintiff's reply brief to Plaintiff's MOTION for SJ & response brief to Defendant's MOTION for SJ is 3/25/96. ORDER RESETTING Plaintiff's MOTION FOR SUMMARY JUDGMENT [18-1] & Defendant's MOTION FOR SUMMARY JUDGMENT [26-1] to the oral argument calendar of 4/15/96 at 1:30pm (counsel notified) Court Rptr none (tely)

DATE	DOCKET NUMBER	PROCEEDINGS
3/25/96	35	REPLY TO Defendants' RESPONSE by Plaintiff Blue Fox Inc re [18-1] MOTION FOR SUMMARY JUDGMENT & response to Defendant's [26-1] MOTION FOR SUMMARY JUDGMENT (tely) [Entry date 03/26/96]
3/25/96	36	STATEMENT OF FACTS by Plaintiff Blue Fox Inc in opposition to Defendants MOTION FOR SUMMARY JUDGMENT [26-1] (tely) [Entry date 03/26/96]
4/8/96	37	MOTION by Defendants' TO EXTEND TIME TO FILE THEIR REPLY TO THEIR MOTION FOR SJ [26-1] (tely)
4/10/96	38	MEMORANDUM by Plaintiff Blue Fox Inc IN OPPOSITION to Defendants MOTION TO EXTEND TIME TO FILE THEIR REPLY TO THEIR MOTION FOR SJ [26-1] [37-1] (tely)
4/12/96	39	REPLY by Defendants IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [26-1] (wri)
4/12/96	40	RECORD OF ORDER by Honorable Helen J. Frye GRANTING MOTION TO EXTEND TIME TO FILE THEIR REPLY TO THEIR MOTION FOR SJ [26-1] [37-1] SETTING MOTION FOR SUMMARY JUDGMENT [26-1] on oral argument calendar of 1:30 4/22/96, SETTING MOTION FOR SUMMARY JUDGMENT [18-1] on oral argument calendar of 1:30 4/22/96 Reply due 4/15/96 (counsel notified) (clar) [Entry date 04/15/96]

DATE	DOCKET NUMBER	PROCEEDINGS
4/22/96	41	RECORD OF PROCEEDINGS before Honorable Helen J. Frye TAKING UNDER ADVISEMENT on 4/22/96 CROSS MOTIONS FOR SUMMARY JUDGMENT [18-1] & [26-1] (counsel notified) Court Rptr D Grube (tely) [Entry date 04/23/96]
5/24/96	42	OPINION: Defendants MOTION FOR SUMMARY JUDGMENT [26-1] is GRANTED; Plaintiffs MOTION FOR SUMMARY JUDGMENT [18-1] is DENIED; Judgment will be entered in favor of the Army and the SBA; Signed 5/24/96 by Honorable Helen J. Frye (counsel notified) (wri) [Entry date 05/29/96]
5/24/96	43	ORDER by Honorable Helen J. Frye GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT [26-1], & DENYING PLAINTIFFS MOTION FOR SUMMARY JUDGMENT [18-1]; Judgment will be entered in favor of Defendants; Signed 5/24/96 (counsel notified) (wri) [Entry date 05/29/96]
5/24/96	44	JUDGMENT IT IS HEREBY ORDERED & ADJUDGED THAT JUDGMENT IS ENTERED IN FAVOR OF THE DEFENDANTS & AGAINST THE PLAINTIFF Signed 5/24/96 (microfilmed 5/24/96) Honorable Helen J. Frye (counsel notified) (wri) [Entry date 05/29/96]

DATE	DOCKET NUMBER	PROCEEDINGS
5/30/96	45	NOTICE OF ADDRESS CHANGE by attorney Thomas F Spaulding for Plaintiff Blue Fox Inc (wri) [Entry date 05/31/96]
6/4/96	46	NOTICE OF APPEAL to Court of Appeals by Plaintiff Blue Fox Inc from Judgment filed 5/24/96 [44-2] (wri)
6/4/96	—	RECEIVED APPEAL fee from Blue Fox Inc in amount of $105.00 (Receipt # 160585) (tomg) [Entry date 06/05/96]
6/5/96	—	NOTIFICATION OF APPEAL mailed to Court of Appeals For the Ninth Circuit and to counsel along with copy of appealed document and docket sheet. (tomg)
6/24/96	47	TIME SCHEDULE ORDER from the US Court of Appeals for the Ninth Circuit CA 96-35648 [46-1] Appellants Transcript Order Form due 7/5/96; Transcripts & Certificate of Record due 8/5/96; Appellants Brief due 9/20/96; Appellees Brief due 10/21/96; Reply Brief due 14 days from Appellees Brief (wri)
6/24/96	48	APPELLANTS NOTICE OF TRANSCRIPT PORTIONS TO BE ORDERED re CA 96-35648; No transcript needed (wri) [Edit date 06/24/96]
6/24/96	49	TRANSCRIPT DESIGNATION AND ORDERING FORM for Plaintiff re appeal CA 96-35648 [46-1]; None ordered (wri) [Edit date 06/24/96]

DATE	DOCKET NUMBER	PROCEEDINGS
7/15/96	50	CERTIFIED COPY OF ORDER from the US Court of Appeals for the Ninth Circuit re CA 96-35648 [46-1] ORDER SETTING ASSESSMENT CONFERENCE on 8/13/96 at 1:00 pm; Conference to be held by telephone unless counsel agree & notify Circuit Mediator that they would prefer to meet in person; see formal 4-page Order (wri) [Entry date 07/16/96]
8/19/96	51	CERTIFIED COPY OF ORDER from the US Court of Appeals for the Ninth Circuit re CA 96-35648 [46-1] This appeal is not selected for inclusion in settlement program; Counsel are requested to contact Circuit Mediator should circumstances develop that might warrant initiation of settlement discussions; Briefing schedule previously established by Court remains in effect (wri)
8/27/96	52	CERTIFICATE OF RECORD transmitted to US Court of Appeals for the Ninth Circuit re appeal CA 96-35648 [46-1] filed by Blue Fox, Inc. on 6/4/96. (tomg)
2/26/97	—	CLERK'S RECORD on appeal requested by fax from US Court of Appeals for the Ninth Circuit on 12/31/96 regarding C/A# 96-35648 [46-1] no transcripts memo (clar)
6/4/97	—	CLERK'S RECORD on appeal (original file in one volume, exhibit #21) transmitted to US Court of Appeals for the Ninth Circuit regarding [46-1] C/A #96-35648 (clar)

DATE	DOCKET NUMBER	PROCEEDINGS
9/12/97	—	CLERK'S RECORD on appeal (original file & Doc#21 returned from US Court of Appeals for the Ninth Circuit regarding [46-1] C/A#96-35648 (clar)
12/15/97	53	MANDATE/JUDGMENT from USCA REVERSING in part, AFFIRMING in part AND REMANDING the Decision of the District Court re Appeal filed 6/4/96 [46-1] CA96-35648; costs taxed in the amount of $248.73 against US Army (tely) [Entry date 12/18/97] [Edit date 12/18/97]
12/30/97	54	RECORD OF ORDER by Honorable Helen J. Frye Parties are to report in writing by 1/30/98 the status of the case & how they wish to proceed on remand (counsel notified) Court Rptr none (tely) [Entry date 12/31/97]
1/30/98	55	PLAINTIFFS STATUS REPORT FOLLOWING REMAND [55-1] (kirk)
2/2/98	56	RECORD OF ORDER by Honorable Helen J. Frye: USA to report to the court if it petitioned for certiorari & how it wishes to proceed; USA to report to the court by 3/20/98 (counsel notified) (kirk)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35648

BLUE FOX INC., A WASHINGTON CORPORATION,
PLAINTIFF-APPELLANT,

v.

SMALL BUSINESS ADMINISTRATION,
THE UNITED STATES ARMY, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
6/18/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 6/14/96; appellee's designation of RT is due 6/24/96, ; appellant shall order transcript by 7/5/96; court reporter shall file transcript in DC by 8/5/96, ; certificate of record shall be filed by 8/12/96; appellant's opening brief is due 9/20/96; appellees' brief is due 10/21/96, ; appellants' reply brief is due 11/4/96; [96-35648] (ft)
6/18/96	Filed attorney for Appellant Civil Appeals Docketing Statement served on 6/4/96 (to CONFATT) [96-35648] [96-35648] (ft)

DATE	PROCEEDINGS
6/24/96	Received Appellant Blue Fox Inc notice of designation of reporter's transcript. (CASEFILE) [96-35648] (sm)
7/8/96	Filed order CONFATT (lw) Case referred to Confatt for assessment conference only. Conference to be held by telephone on 8/13/96 at 1:00 p.m. Pacific Time. The case will be processed through the Settlement Program's SEATTLE OFFICE. The existing briefing schedule remains in effect. [96-35648] (sm)
8/15/96	Filed order CONFATT (CG) The appeal is not selected for inclusion in the settlement program. Counsel are requested to contact the Circuit Mediator should circumstances develop that might warrant the initiation of settlement discussions. The briefing schedule previously established by the court remains in effect. [96-35648] (sm)
9/4/96	Filed certificate of record on appeal RT filed in DC n/a [96-35648] (ft)
9/11/96	14 day oral extension by phone of time to file Appellant brief. [96-35648] appellants' brief due 10/4/96; appellees' brief due 11/4/96; optional reply brief is due 14 days from service of the answering brief. (mag)

DATE	PROCEEDINGS
10/8/96	Filed original and 15 copies Appellant Blue Fox Inc opening brief (Informal: n) 21 pages and five excerpts of record in 1 volumes; served on 10/4/96 (96-35648] (sm)
10/30/96	14 day oral extension by phone of time to file Appellee Small Business Admin, Appellee U.S. Army's brief. [96-35648] appellees' brief due 11/18/96 for U.S. Army, for Small Business Admin; the optional reply is due 14 days thereafter. (clp)
11/19/96	Received orig. 15 copies Small Business Admin, U.S. Army's brief of 22 pages and 1 volume of supplemental excerpts of record; served on 11/18/96 deficient: brief does not contain a brief format certification. Excerpts should be bound on left hand side. Response to brief deficiency notice due 12/3/96 (sm)
11/27/96	Received Appellees Small Business Admin. and U.S. Army satisfaction of (minor) brief deficiency. (brief format certification and excerpts bound on left hand side) [96-35648] (sm)
11/27/96	Filed original and 15 copies appellee Small Busines. Admin. and U.S. Army's 22 pages brief, 1 Exc. vols; served on 11/18/96 [96-35648] (sm)

DATE	PROCEEDINGS
12/9/96	Received orig. 15 copies Blue Fox Inc's reply brief (Informal: n) of 19 pages; served on 12/5/96 deficient no brief format certification. Notified counsel. Response to brief deficiency notice due 12/23/96; (sm)
12/16/96	Received Appellant Blue Fox Inc's satisfaction of (major) brief deficiency, served on 12/13/96 (brief format certification) [96-35648] (sm)
12/16/96	Filed original and 15 copies Blue Fox Inc reply brief, (Informal: n) 19 pages; served on 12/5/96 (re-docketed by hh) [96-35648] (hh)
2/20/97	Calendar check performed [96-35648] (dj)
5/5/97	Calendar material being prepared. [96-35648] (mw)
5/7/97	CALENDARED: Portland July 10, 1997 9:00 a.m. [96-35648] (mw)
7/10/97	ARGUED AND SUBMITTED TO Warren J. FERGUSON, Stephen R. REINHARDT, Pamela A. RYMER [96-35648] (jlb)

DATE	PROCEEDINGS
8/25/97	FILED OPINION: REVERSED IN PART, AFFIRMED IN PART, AND REMANDED. Blue Fox is entitled to its costs on appeal. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Warren J. FERGUSON, author; Stephen R. REINHARDT; Pamela A. RYMER, concurring in part and dissenting in part.) FILED AND ENTERED JUDGMENT. [96-35648] (hh)
9/9/97	Filed Appellant Blue Fox Inc bill of costs for $248.73, served on 9/4/97 [96-35648] (crw)
10/9/97	[3319683] Filed original and 40 copies Appellee U.S. Army petition for rehearing with suggestion for rehearing en banc; 15 p.pages, served on 10/8/97 (PANEL AND ALL ACTIVE JUDGES) [96-35648] (hh)
10/9/97	Rec'd notice of appearance of Mary K. Doyle and Barbara C. Biddle as atty for aples Small Business Admin. and the U.S. Army. (CASEFILES) [96-35648] (hh)
11/7/97	Filed order (Warren J. FERGUSON, Stephen R. REINHARDT, Pamela A. RYMER,): . . . The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED. [96-35648] (hh)

DATE	PROCEEDINGS
11/24/97	Filed Appellant Blue Fox Inc.'s motion for attorney(s)' fees in the amount of $51,766.53; served on 11/21/97 (3346573] (to PANEL) [96-35648] (hh)
12/5/97	Filed aple U.S. Army's motion for ext of time (to file response to motion for atty's fees); served on 12/4/97 (to PANEL) [3354555] (hh)
12/9/97	MANDATE ISSUED. Costs are taxed against aple U.S. Dept. of the Army in the amt of $248.73. [96-35648] (hh)
12/17/97	Filed order (Warren J. FERGUSON, Stephen R. REINHARDT, Pamela A. RYMER,): The motion of the govt filed 12/5/97 for an ext of time to file its response to aplt's request for atty fees and expenses is GRANTED. [96-35648] (hh)
12/22/97	Filed Appellees Small Business Admin. and U.S. Army's opposition to motion for attorney's fees and costs; served on 12/22/97 (to PANEL) [96-35648] (hh)
1/30/98	Received letter from the Supreme Court dated 1/27/98 re: application for an extension of time within which to file a petition for a writ of cert . . . extended the time to and including 3/7/98. [96-35648] (hh)

DATE	PROCEEDINGS
3/2/98	Received letter from the Supreme Court dated 2/26/98 re: application for a further extension of time within which to file a petition for a writ of ~~cert~~...extended the time to and including 4/6/98. [96-35648] (hh)
4/6/98	Received Herbert C. Sundby for Appellees U.S. Army, et al., letter dated 4/3/98 re: The solicitor general, U.S. DOJ, has decided to petition for writ of cert with the Supreme Court. The petition will be filed Monday, 4/6/98. I will advise the court as soon as the SC decides whether or not to accept the petition. (CASEFILES) [96-35648] (hh)
4/16/98	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 97-1642 filed on 4/6/98 [96-35648] (hh)
7/1/98	Received notice from Supreme Court, petition for certiorari GRANTED on 6/26/98. Supreme Court No. 97-1642 (hh)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil #95-612-FR

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY,
DEFENDANTS

DEFENDANT UNITED STATES ARMY'S ANSWER TO PLAINTIFF 'S FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1: State the reason(s), if any there be, why no Miller Act bond was in place for Plaintiff's protection under Contract Number DAEA 08-93-C-0056.

ANSWER: The reason is not clear from the record. It may have been because the contract was classified under Standard Industrial Classification (SIC) Code 4813, telephone communications, and that government personnel did not require the payment bond because the primary SIC code was determined to be 4813, a non-construction SIC code. It may also have been because the government believed it could waive the Miller Act requirements.

INTERROGATORY NO. 2: State the total amount of money paid to Verdan Technology, Inc. ("Verdan") under Contract Number DAEA08-93-C-0056.

ANSWER: $347,481.61.

INTERROGATORY NO. 3: State the date and amount of each payment made to Verdan under Contract Number DAEA08-93-C-0056.

ANSWER: See attached document.

INTERROGATORY NO. 4: State the money, if any, retained by the Army under Contract Number DAEA08-93-C-0056.

ANSWER: None.

INTERROGATORY NO. 5: State the money, if any, paid to or received by Defendant United States Small Business Administration under Contract Number DAEA08-93-C-0056.

ANSWER: None.

INTERROGATORY NO. 6: State whether a contract has been awarded for the completion of Contract Number DAEA08-93-0056 following Verdan's default.

ANSWER: An existing document was modified to include the work under Contract Number DAEA08-93-0056.

INTERROGATORY NO. 7: If a contract has been awarded for the completion of Contract Number DAEA08-93-C-0056 following Verdan's default, state

the amount, if any remaining unpaid under said contract.

ANSWER: The work on the modified contract discussed in the answer to Interrogatory No. 6 has been completed and it appears there will be no unpaid balance upon receipt of the appropriate billings from the contractor.

INTERROGATORY NO. 8: If a contract has not been awarded for the completion of Contract Number DAEA08-93-C-0056 following Verdan's default, state whether funding is available for such a contract.

ANSWER: An existing contract was modified to include the work under Contract Number DAEA08-93-0056. The funding for performance of the installation of government furnished telecommunications equipment came from the funds which had not been disbursed for Contract Number DAEA08-93-0056 and an additional roughly $50,000[ ] which had to be obligated to complete the project.

INTERROGATORY NO. 9: State the date of the contracting officer's final decision, if any assessing excess costs of reprocurement against Verdan following its default under Contract Number DAEA08-93-C-0056.

ANSWER: There has been no final decision by the contracting officer assessing excess costs of reprocurement against Verdan following its default under Contract Number DAEA08-93-C-0056.

VERIFICATION

I, *Hildegard Choate*, am the *contracting officer*, for the Department of Army, one of the defendants named herein, have read the foregoing answers to Plaintiff's First Set of Interrogatories to Defendant Army, know the contents thereof and believe the same to be true and correct, and acknowledge that I am authorized to execute these interrogatories on behalf of the Department of Army.

I declare under penalty of perjury in accordance with 28 U.S.C. § 1746, that the statements made in this verification are true and accurate to the best of my knowledge and belief.

Signed this 21st day of September, 1995.

/s/ HILDEGARD CHOATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. CV95-00612-FR

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY,
DEFENDANTS

AFFIDAVIT OF DAVID L. LUMLEY

I, David L. Lumley, being duly sworn, depose and say as follows:

1. I am president of Blue Fox, Inc. ("Blue Fox"), a Washington Corporation engaged in the construction industry. I make this Affidavit in support of Plaintiff's Motion for Summary Judgment.

2. I am personally familiar with Contract Number DAEA08-93-C-0056, the contract which is the subject of this lawsuit. Pursuant to the Small Business Administration's 8(a) program, the Department of the Army awarded Contract Number DAEA08-93-C-0056 to the SBA on or about September 29, 1993. The SBA in turn awarded the contract to Verdan Technology, Inc. ("Verdan"), an eligible 8(a) contractor.

3. Under Contract Number DAEA08-93-C-0056, Verdan was required to install a Government Fur-

nished Equipment (GFE) AT&T Definity G1 Electronic Switching System (ESS) at Umatilla Army Depot, Oregon. Item 0001 of the Verdan contract required construction of a 20 foot by 25 foot (500 square foot) concrete block building with concrete foundation and gable roof in which to house the switching system. The contractor was also required to install a 6 foot by 20 foot cable vault underneath the new building, and provide all electrical, fire suppression/detection systems, air conditioning/heating systems, and structural details of the new building.

4. On October 14, 1993, Verdan and Blue Fox entered into a General Contract Agreement, attached hereto as Exhibit 1. Under this subcontract, Blue Fox agreed to perform the construction portion of Contract Number DAEA08-93-C-0056, including the construction work described in paragraph 3 above, for a total price of $185,522.80. A subsequent change order increased the price to $186,347.80. Blue Fox's subcontract price represented approximately 43% of the $430,879.00 total price of the contract between SBA and Verdan.

5. Blue Fox satisfactorily completed all work under the subcontract. Blue Fox had substantially completed this work by May, 1994. However, Verdan failed to pay Blue Fox $46,536.14 which is still owing for construction work performed by Blue Fox at the Umatilla Army Depot.

6. I subsequently learned that the Army terminated Verdan's contract for default. Officials at the Umatilla Army Depot informed me that the termination related to Verdan's failure to complete Item

0002 of the contract, and was unrelated to any work provided by Blue Fox.

7. Following Verdan's default, during the spring of 1995, Blue Fox returned to Umatilla and performed minor clean up work on the project. Blue Fox did this to ensure that Verdan could not argue that any part of the job was left undone by Blue Fox.

8. On January 17, 1995, Blue Fox obtained a default judgment in the Tribal Court of the Yakima Indian Nation against Verdan Technologies, Inc., and its officials William J. Reubel, Jr. and Gary C. Andrews, Tribal Court Case No. C-94-77. Blue Fox has collected no part of said judgment. Existing liens against Verdan Technologies, Inc., in the amount of $248,000 precede Blue Fox's judgment. Existing liens against William J. Reubel, Jr. and Gary C. Andrews far exceed said individuals' net worths.

9. At the time Blue Fox agreed to be the construction subcontractor on Verdan's contract, Blue Fox was an experienced federal construction contractor, and had performed such contracts both as prime and subcontractor. At all material times, I believed that Contract Number DAEA08-93-C-0056 was subject to the Miller Act requirement that the prime contractor on federal construction contracts post a bond to ensure that all subcontractors get paid. I further believed that Blue Fox was entitled to the protection of a Miller Act bond on the Verdan contract.

10. Blue Fox was unaware, until approximately June 15, 1994, that no Miller Act bond was in place for its protection. Until such time, Blue Fox had believed such a bond was in place, in part due to

Verdan's insistence that Blue Fox itself put up a bond to protect lower tier subcontractors and suppliers.

11. On June 15, 1994, Blue Fox promptly informed both the Army and the SBA in writing that Blue Fox was an unpaid subcontractor, and requested that Verdan's payment be suspended or reduced until Blue Fox was fully paid. I earlier called the Army on May 24, 1994, and informed them that Blue Fox had not been paid in the past month. I also sent to the Army a copy of Blue Fox's May 24, 1994, letter to Verdan complaining of non-payment.

12. Blue Fox, Inc. was never contacted by anyone in accordance with the Miller Act bond waiver provisions contained in 13 CFR § 124.305. These provisions require, in relevant part, that an 8(a) contractor which receives an exemption from Miller Act bonding requirements, must notify and obtain a written acknowledgment from persons supplying the 8(a) contractor with materials or labor.

13. Had Blue Fox been informed that no Miller Act bond was in place for its protection, Blue Fox would not have agreed to perform the work on the Verdan contract.

/s/ DAVID L. LUMLEY
DAVID L. LUMLEY

SIGNED AND SWORN to before me this 9th day of February, 1996.

/s/ SIGNATURE ILLEGIBLE
Notary Public of Washington
My commission expires:

CONVERSATION RECORD DATE: 24 May 94

Name of Person contacted or in contact with you:
Gary Andrew
Organization: Verdan Technology
Telephone: 206-848-1843

SUMMARY:

1. Called the contractor requesting status of the certified letter sent to them 10 May 94 (faxed same day) pertaining to the delinquent CDRL's. Also advised him that the sub-contractor has complained to the COR that they have not received payment for the work performed. Dave Lumby of Blue Fox (509-848-2773) called advising that he had not been paid in the last month.

2. Gary advised that he would respond to the letter in the next couple days. Advised he was behind in his payment and would make payment soon. He also advised that he was presently working on CDRL 4 and expected to mail it next day or two. CDRL's 3 & 5 by mid-next week.

3. Called SBA, Linda Sawyers to inform her that Verdan was not responding to our letter and requested any assistance she could provide. This was in response to her call of 18 May addressing the copy of 10 May letter they had received.

4. Called the COR Dean McKay DSN 790-5276 and informed him of the contractor's responses to the

phone conversation. Requested he keep me advised on the receipt of the CDRL's.

/s/ JB
JOANNE BONNER
Contractor Specialist

[handwritten note:] June 2 Subcontractor called again regarding payment—

Contractor - Verdan Gary Andrews advised me that the sub hasn't completed all his tasks but he would send a copy of invoice to us that he intended to process soon. Joanne

Blue Fox, Inc.
GENERAL CONTRACTOR
BLUEFI*151QQ DMBE Certified

500 NORTH WILDWOOD ROAD * WAPATO, WASHINGTON 98951
* (509) 848-2773

May 26, 1994

Verdan Technology Inc.
16715 Meridian East Building G
Puyallup, Wa. 98373

Re: DCO Bldg. & Vaults, Umatilla, Or.

Attn: William Reubel

We have completed all items of our contract with the exception of the as-built drawings and electric. The as-built drawings have been red lined and Barbara Jean Studstill has copies. Level 1 as-built will be completed and delivered within one week to your office. Our electrician is holding off completion of the electrical until the battery system has been delivered which was requested three weeks ago, otherwise we would be 100% complete.

A final inspection was conducted on May 25, 1994 and all items found to be incomplete will be completed on May 26, 1994. Should you desire to conduct another final inspection please schedule it for May 31, 1994 through June 3, 1994. Failure to schedule a final

inspection with us and the owner during this time will demonstrate that you accept the work in its entirely and that we are 100% complete.

Contract Amount	$185,522.80
Change Order	825.00
Total Contract	$186,347.80
Paid to Date	120,884.68
Balance Due	$ 65,463.12
Unpaid Previous Interest	1,497.45
Last 30 Days Interest	643.62
TOTAL DUE	$ 67,604.19

Blue Fox, Inc. expects final payment plus retention by June 30, 1994. Please inform us in writing of any item needed to be corrected or completed no later than June 3, 1994. Failure to do so will show that you have accepted our performance of the work in accordance to our General Contract Agreement.

Sincerely,

/s/ DAVID L. LUMLEY

David L. Lumley, President
Blue Fox Inc.

c.c. Dean C. McKay
Chief of Information Management
Unatilla Army Depot

Blue Fox, Inc.
GENERAL CONTRACTOR
BLUEFI*151QQ DMBE Certified

500 NORTH WILDWOOD ROAD * WAPATO, WASHINGTON 98951
* (509) 848-2773

June 15, 1994

Department of the Army
United States Army Information Systems Command
Office of Acquisition
134 Mal Brouk Street
Fort Ritchie, Maryland 21719-4020

Attn: Command Support Acquisition Branch
Mary Ann Keyser, Contracting Officer

Re: Verdan Technology, Inc. Contract No. DAEA08-93-C-0056

Ms. Keyser,

Blue Fox, Inc. is a subcontractor to Verdan Technology, Inc. of Puyallup, Washington. We constructed a DCO building, installed telephone vaults, and duct lines by Umatilla, Oregon at the Army Depot. We were substantially complete on or about April 29, 1994. The only item left to complete is the electric which has been held up due to the connecting of the batteries which are to be supplied by Verdan, Inc. The request to have the batteries on site was made prior to our electrical installation on May 24, 1994 and we believe they are still not on site otherwise we would be 100% complete.

On May 24, 1994, Gary Andrews of Verdan Tech. indicated that Verdan had not received payment as of yet for work that we had completed. On April 25, 1994 we submitted a bill for $42,907.93 plus interest which was delinquent from previous months for a total of 98% complete. (See attached) On May 26, 1994 we sent a letter by registered mail and then by fax on May 31, 1994 in an attempt to resolve any disputes or problems. Phone calls to Verdan's office has also been made but William Reubel and Gary Andrews are never available and have yet to return our phone calls.

We believe:

P.L. 100-496, The prompt payment act should apply here, and request that FAR 32.503-6 suspension or reduction of payment be administered by your agency until this is resolved. Would you please confirm that Verdan Technology does not have a bond on this project and what measures we may take to secure payment? Please respond to us in writing as soon as possible.

Thank you,

/s/ DAVID L. LUMLEY

David L. Lumley, President
Blue Fox Inc.

c.c. William J. Reubel, Jr.
Verdan Technology, Inc.

c.c. Linda Sawyer
SBA

VERDAN TECH. INC. — DAEA08-93-C-0056

TAB SUMMARY - PART 5

DOCUMENTS

FISCAL SECTION

INVOICES

MATERIAL INSPECTION AND RECEIVING REPORT
PUBLIC VOUCHER FOR PURCHASES SERVICES
OTHER THAN PERSONAL (SF 1034)

Basic $430,870.00
P00004 1,513.23

PAYMENT	DOV# INVOICE MOD	COST AFTER DISCOUNTS	PAYMENT DATES	BALANCE
ONE	202763 VTI 1001	$19,816.72	10 Dec 93	$432,392.13 412,575.41
TWO	203557 VTI 1002	$55,991.44	10 Jan 94	356,583.97
THREE	204710 VTI 1003	$31,905.66	17 Feb 94	324,678.31
FOUR	205081 VTI 1004	$40,072.01	28 Feb 94	284,606.30
FIVE	205514 VTI 1005	$39,213.80	15 Mar 94	245,392.50
SIX	206764 VTI 1006	$74,349.65	22 Apr 94	171,042.85
SEVEN	209801 VTI 1007	$54,561.27	05 Jul 94	116,481.58
EIGHT	211770 VTI 1008	$30,073.06	25 Aug 94	86,408.52
NINE	200320 VTI 1009	$ 1,498.00	11 Oct 94	84,910.52
	DISCOUNTS TAKEN:			
ONE	$ 200.12			
TWO	565.67			
THREE	322.28			
FOUR	404.77			
FIVE	396.10			
SIX	751.01			
SEVEN	551.12			
EIGHT	303.77			
NINE	15.13			
TOTAL	$3,509.92			

ISCCA FORM 7 CARD E

July 12, 1995
/s/ J.R. LaChance

[seal omitted] [seal omitted]

DEPARTMENT OF THE ARMY
UNITED STATES ARMY INFORMATION
SYSTEMS COMMAND
OFFICE OF ACQUISITION
134 MALBROUK STREET
FORT RITCHIE, MARYLAND 21719-4020

REPLY TO ATTENTION OF

September 15, 1994

Office of Acquisition

U.S. Small Business Administration
Seattle District Office (Ms. Sawyers)
915 Second Avenue, Room 1792
Seattle, Washington 98174-1088

Dear Ms. Sawyers:

Reference Contract Number DAEA08-93-C-0056 (1013-93-2-00102), Umatilla Switch Installation, Hermiston, Oregon.

Several problems have surfaced with the referenced contract for which your assistance is requested. The concerns with the progress of Verdan Technology, Incorporated have escalated to the level where our customer has requested that we issue a cure notice to the contractor. It is currently our intent to comply with their request. If you nonconcur with this plan of

action, it is requested that you provide justification as to why a cure notice should not be issued.

The most severe items of concern are as follows:

a. Many of the Contract Data Requirements List (CDRL) submissions are delinquent. We issued a letter to Verdan on 20 July 1994 which identified those CDRL items which were delinquent and directed the contractor to take immediate action to correct the problems. A request that they respond with their intentions to improve the delivery schedule was issued with a suspense of 1 August 1994. We have not received the requested information from them at this time. Several of the CDRLs have been delivered but many remain delinquent.

b. The contract contains the requirement to provide government personnel with training in the operations of the new switch, to be administered by AT&T, the manufacturer of the switch. The requirement for the training has been completed but the contractor who provided the training has not been paid. That contractor has contacted the government personnel on several occasions concerning payment for their services.

c. We have been contacted by a subcontractor, Blue Fox, Inc., concerning nonpayment. Although we have no privity of contract with Blue Fox, we are concerned when a contractor fails to pay his subcontractors in a timely manner.

d. The monthly COR reports for the period of April through September 15 are rated as unsatisfac-

tory based on the above information plus an indication that the grounding in the DCO is incorrect.

e. We have made numerous attempts to reach the contractor telephonically, including leaving messages on the answering machine, but have been unsuccessful in our attempts.

We are receiving considerable pressure from our customer to resolve the problems with Verdan as soon as possible, therefore, your expeditious response is needed. If you have questions or further information is needed, please contact the contract administrator, Kathy Robinson, (717) 878-5597.

/s/ MARY ANN KEYSER
MARY ANN KEYSER
Contracting Officer

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

CONTRACT ID CODE: J | PAGE OF PAGES: 1 | 2

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00006	03/17/95	w47g22-2219-8600	ATS- 9043

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than item 6)	CODE
USAISC CONTRACTING OFFICE ATTN: ASQN-A BUILDING 61801, ROOM 2433 FORT HUACHUCA, AZ 85613-5000 JR LaCHANCE C2S (602)538-7472			

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) Vendor ID: 00013069		9A. AMENDMENT OF SOLICITATION NO.
DYNAMIC CONCEPTS INC. 2176 WISCONSIN AVE NW WASHINGTON DC 20007-	X	9B. DATED (SEE ITEM 11) 10A. MODIFICATION OF CONTRACT/ORDER NO. DAEA08-94-D-0004 10B. DATED (SEE ITEM 13) 03/09/94
CODE 7V965	FACILITY CODE	

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
see block 14

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

00	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103 (b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
X	D. OTHER (Specify type of modification and authority) FAR 52.243-1 Changes Fixed Price, Alt II & DCI ltr 2-13-95

E. IMPORTANT: Contractor ☒ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

a. Modification P00001 block 14.3 is revised as follows:
The total amount of the contract is changed from 857,125.21 to 8151,836.02, an increase of 894,710.81. Total obligated amount remains unchanged and is 857,125.21.

b. Modification P00005 block 14 is revised as follows:
This modification reserves subject to availability of funds for FY 95 in the amount of 883,200.00. The total obligated amount

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print) JEROME MILES	
15B. CONTRACTOR/OFFEROR Fulvio Alfonso (Signature of person authorized to sign)	15C. DATE SIGNED 3/22/95	16B. UNITED STATES OF AMERICA BY Jerome Miles (Signature of Contracting Officer)	16C. DATE SIGNED 22 Mar 95

NSN 7540-01-152-8070
PREVIOUS EDITION UNUSABLE

30-105

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

BEST AVAILABLE COPY

attachment for complete breakdown of labor, equipment, and other direct costs. DCI shall not use it's current switch maintenance labor force to complete this effort, if that use impacts on DCI's switch maintenance responsibilities.

c. Remove Contract Section B, page B-35, and replace it with the attached revised page B-35. Changes are denoted by vertical lines down the right margin.

d. Total contract amount is hereby increased by $126,772.78, from $140,325.20 to $267,097.98.

e.	obligated amount	Funds SAF:
FY 95	$209,972.78	11,510.81
Total:	$267,097.99	11,510.81

f. Accounting and Appropriation Data:

2132020 000000 33802 393100A4000 2572 1AC043 00000000000000
AEZ900 S18049 $60,582.13

2132020 000000 33802 398610A1000 2572 1AC013 00000000000000
AEZR00 S18049 $20,818.60

2152020 000000 33802 432100A1000 25CZ 1C2015 00000000000000
AAZJ00 S18049 $45,372.05

SECTION B

NO.	DESCRIPTION OF SUPPLY/SERVICE	UNIT	QUANTITY		FACTOR (B)	LABOR RATE (C)	EXTENDED AMOUNT (A)*(B)*(C)	ESTIMATED TOTAL BY FISCAL YEAR
				SOLICITATION NO. DAEA08-94-R-0001				
				UMATILLA AD				
0011CN	Provide cable splices in increments of 25 for enhancements IAW PWS, Atlach. 1	INC	(A)					
			5	FY94	1.1	$24.89	$136.90	$136.90
			RANGE	FY95	1.1	$24.89	$136.90	$136.90
			0-100	FY96	1.1	$24.89	$136.90	$136.90
				FY97	1.1	$24.89	$136.90	$136.90
				FY98	1.1	$24.89	$136.90	$136.90
0011CO	Provide cable splices for Fiber Optic cables for enhancements IAW PWS, Atlach. 1	EACH	(A)					
			5	FY94	1.5	$24.89	$186.68	$186.68
			RANGE	FY95	1.5	$24.89	$186.68	$186.68
			0-25	FY96	1.5	$24.89	$186.68	$186.68
				FY97	1.5	$24.89	$186.68	$186.68
				FY98	1.5	$24.89	$186.68	$186.68
0011CP	Provide replacement telephone poles IAW the PWS during normal duty hours	EACH	(A)					
			5	FY94	7	$24.89	$871.15	$871.15
			RANGE	FY95	7	$24.89	$871.15	$871.15
			0-25	FY96	7	$24.89	$871.15	$871.15
				FY97	7	$24.89	$871.15	$871.15
				FY98	7	$24.89	$871.15	$871.15
0014	Complete Install of AT&T Definity switch IAW SOW ASQB-COP-NE 04C-059-92							32,108.10
	ESTIMATED TOTAL FROM PROPOSAL FY94						$6,421.62	$126,772.78
	ESTIMATED TOTAL FROM PROPOSAL FY95						$6,421.62	
	ESTIMATED TOTAL FROM PROPOSAL FY96						$6,421.62	
	ESTIMATED TOTAL FROM PROPOSAL FY97						$6,421.62	
	ESTIMATED TOTAL FROM PROPOSAL FY98						$6,421.62	
	TOTAL PRICE FOR ALL FISCAL YEARS						$32,108.10	$32,108.10

MATERIAL INSPECTION AND RECEIVING REPORT

1. PROC. INSTRUMENT IDEN. (CONTRACT)	(ORDER) NO	6 INVOICE	7 PAGE	OF
DAEA08-94-C-0004 Mod P0000		T6	1	3

2. SHIPMENT NO	3. DATE SHIPPED	4. B/L / TCN	5 DISCOUNT TERMS	8 ACCEPTANCE POINT
	27 Jul 95	N/A	N/A	

9. PRIME CONTRACTOR CODE	10. ADMINISTERED BY CODE
Dynamic Concepts inc. 2176 Wisconsin Ave., N.W. Washington, D.C. 20007	USAISC Contracting Office Attn: ASQH-A, Jack LaChance Bldg 61801, Room 2430 Fort Huachuca, Arizona
11. SHIPPED FROM (if other than 9) CODE FOB:	12. PAYMENT WILL BE MADE BY CODE
	Defense Finance and Accounting Servic Rock Island Operating Location Bldg 68, Attn: DFAS-RI Vendor Pay Rock Island, IL 61299-8000
13. SHIPPED TO CODE	14. MARKED FOR CODE
Commander, Umatilla Army Depot Attn: SDSTE-UA-IMO Hermiston, OR 97838	

15. ITEM NO.	16. STOCK/PART NO. DESCRIPTION (Include number of shipping container - type of container - container number)	17. QUANTITY SHIP/REC'D *	18. UNIT	19. UNIT PRICE	20. AMOUNT
	REFER TO ATTACHED				
	CLIN 0014				
A	Labor A1, A2, A3, & A4				$18,880.00
B	EQUIPMENT B1, B2, B3, B4, B5, & B6				$32,070.00
C	ODC C1, C2, C3, C4, &C5				$55,896.00
D	G & A 13%				$13,889.98
E	Profit 5%				$ 6,036.80
F	Sub Total				$126,772.7

21. PROCUREMENT QUALITY ASSURANCE		22. RECEIVER'S USE
A. ORIGIN	B. DESTINATION	Quantities shown in column 17 were received in apparent good condition except as noted.
☐ POA ☐ ACCEPTANCE of listed items has been made by me or under my supervision and they conform to contract, except as noted herein or on supporting documents.	☐ POA ☐ ACCEPTANCE of listed items has been made by me or under my supervision and they conform to contract, except as noted herein or on supporting documents.	
DATE	DATE 8-23-95	DATE RECEIVED
SIGNATURE OF AUTH GOVT REP	SIGNATURE OF AUTH GOVT REP	SIGNATURE OF AUTH GOVT REP
TYPED NAME AND OFFICE	TYPED NAME AND TITLE	TYPED NAME AND OFFICE
		* If quantity received by the Government is the same as quantity shipped, indicate by (✓) mark. If different, enter actual quantity received below quantity shipped and encircle.

23. CONTRACTOR USE ONLY

OPTIONAL FORM 08 (7-90)

FAX TRANSMITTAL # of pages ▶ 3

To	From
USAISC CONTRACTING	DEAN McKAY
Dept./Agency	Phone #
JOHN STUELZLE	790-5276
Fax #	Fax #
879-7471	790-5250

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

ORIGINAL

DD FORM 250 REPLACES EDITION OF 1 AUG 87 WHICH MAY BE USED

DEPOSIT TICKET

DYNAMIC CONCEPT

SIGNET BANK

10-10 95

CURRENCY

COIN

CHECKS

TOTAL ITEMS 4

$ 139316 87

:500000080: #667-00 27835#

United States Treasury 15-61/000

ARMY FINANCE

5061-00634560

Check No.

FORT RITCHIE, MARYLAND

200120

4560

10/05/9

Pay to

**********ONE---TWO--FIVE--FOUR--FOUR DOLLARS 09 CENTS

DYNAMIC CONCEPTS INC
C/O SIGNET BANK N.A.
PO BOX 2329
MERRIFIELD VA 22116-2329

****** $12,844.0

VOID AFTER ONE YEAR

#506112# :000000518: 006345603#

United States Treasury 15-61/000

ARMY FINANCE

6410-60316332

Check No.

ROCK ISLAND ARSENAL, ILLINOIS

Pay to the order of 200056

6332

10/02/95

**********ONE---TWO---SIX-SEVEN-SEVEN---TWO DOLLARS 78 CENTS

DYNAMIC CONCEPTS, INC.
C/O SIGNET BANK N.A.
PO BOX 2329
MERRIFIELD VA 22116-2329

****** $126,772.78

VOID AFTER ONE YEAR

O.R Love

#641108# :000000518: 60316332#

PURCHASE REQUEST AND COMMITMENT
For use of this form, see AR 37-108; the proponent agency is USAFAC.

PURCHASE INSTRUMENT NO.

REQUISITION NO. W67G22-2219-8600

DATE 04 Aug.1995

PAGE 1 OF 1 PAGES

TO: Purchasing and Contracting Officer

THRU: Office of Acquisition

FROM: DOIM, UMDA, Hermiston, OR. 97838

It is requested that the supplies and services enumerated below or on attached list be:

PURCHASED FOR Umatilla Depot Activity HERMISTON, OR. 97838

DELIVERED TO Dean C. McKay

NOT LATER THAN (Date)

The supplies and services listed below cannot be secured through normal supply channels or other Army supply sources in the immediate vicinity, and their procurement will not violate existing regulations pertaining to local purchases for stock, therefore, local procurement is necessary for the following reason: (Check appropriate box and complete item.)

NAME AND TELEPHONE NO. OF PERSON TO CALL FOR ADDITIONAL INFORMATION
Dean C. McKay, C. Info. Mngt.
DSN 790 5276

☐ LOCAL PURCHASE AUTHORIZED AS THE NORMAL MEANS OF SUPPLY FOR THE FOREGOING BY

☐ REQUISITIONING DISCLOSES NONAVAILABILITY OF ITEMS AND LOCAL PURCHASE IS AUTHORIZED BY

☐ EMERGENCY SITUATION PRECLUDES USE OF REQUISITION CHANNELS FOR SECURING ITEM

ITEM	DESCRIPTION OF SUPPLY OR SERVICES	QUANTITY	UNIT	ESTIMATED Unit Price	ESTIMATED Total Cost
	Amendment to Requisition No. W67G22-2219-8600 to read PRLC is submitted to provide FY96 funding for the Administrative Telephone Contract(ATS) Date of Contract: 1 October 95 thru 30 Sept. 96. This requirement is included or provided for in the financial plan for FY96. The accounting classification will be as shown in the acct class block. This statement is not a commitment of funds. CC: 02000 43200 PCN: SUCO14				$94,811

Fund Certification

The supplies and services listed on this request are properly chargeable to the following allotments, the available balances of which are sufficient to cover the cost thereof, and funds have been committed.

ACCOUNTING CLASSIFICATION	AMOUNT
97X4930.AAPG 6P 257G S42037	$94,811

DATE	TYPED NAME AND TITLE OF CERTIFYING OFFICER	SIGNATURE
25Sep95	ROBERT G. NANCARROW C, Program & Budget TEAD	Margaret C Herd

DISCOUNT

PURCHASE ORDER NUMBER

DELIVERY SCHEDULE

THE FOREGOING ITEMS ARE REQUIRED NOT LATER THAN AS INDICATED ABOVE FOR THE FOLLOWING PURPOSE

Approved by commanding officer or his designee

DATE	TYPED NAME AND GRADE OF INITIATING OFFICER	SIGNATURE
04 Aug.95	J. PATRICK RITCHIE GS-12	Jay Patrick Ritchie
DATE	TYPED NAME AND GRADE OF SUPPLY OFFICER	SIGNATURE

DATE	TYPED NAME AND GRADE OF COMMANDING OFFICER OR DESIGNEE	SIGNATURE
04 Aug.95	MARIE L. BALDO LTC, QD Commanding	Marie L Baldo

DA FORM 1 AUG 78 3953

PREVIOUS EDITIONS OF THIS FORM WILL BE USED UNTIL EXHAUSTED

22 July 93

MEMORANDUM FOR THE RECORD

Topic: BONDING REQUIREMENTS

I briefly spoke with John Singly on the subject. He mentioned that the SBA in Seattle said that since the SIC code for VERDAN is not a construction type code than the contract would not require bonds even though 25% was construction related. I mentioned that I would like to know a source reference for the amendment guidance. He gave me Mary Jo Witty's no. in the SBA, Seattle office.

I called her and explained the situation. I asked if VERDAN could add their name onto their sub's bonds? and would the surety accept it with VERDAN's name on it?

She mentioned that she knew SBA Bond "specialists" that she could call and that she knows some individuals in sureties who she would call as well.

She said she would call me back after she got more information.

I then called The Office of the Judge Advocate General for the Dept of the Army which is where I need to send the Bonds upon our receipt of them. They said only t VERDAN could get the bonds and that we did not have a contract with VERDAN's subs. She was very adamant about the subject. She kept referring to VERDAN as the prime, but they are not. SBA is

essentially the prime. I don't think she works with many SBA 8(a) companies.

I would like to wait until I hear from Ms Witty, SBA in Seattle.

Everything else is ready to go in the amendment.

/s/ ELIZABETH K. FALER
ELIZABETH K. FALER
Contract Specialist

22 July 1993

Caller: Mary Jo Witty SBA Seattle (206) 553-8539

I received a call from Ms. Witty at 1600 hours. She mentioned that she spoke with the sureties and the bonding specialists in SBA.

I related what the Dept of the Army Judge Advocate's Office had said. She completely disagreed with their recommendations.

Her rationale:

1) Verdan isn't a construction company, but a service one according to it's primary SIC code.

2) Regardless of the price of getting a bond, Verdan probably wouldn't even qualify for a $200,000 bond because of its lack of experience in construction. She mentioned that it has to start on relatively small jobs and after experience it can increase its bond threshholds.

3) Even if it were eligible to get bonds, it would need a bond for the entire contract amount, not just the construction portion.

4) A surety will not accept a sub adding inexperienced Verdan onto a bond with "their" construction company.

Her recommendations:

1) We cannot require Verdan to submit bonds.

2) She recommends that we delete the bonding requirement and therefore the Notice to Proceed section.

3) All we could do, she said, is to highly recommend that the primary, which she called Verdan, have their subcontractor give them a bond for the construction job. She reminded me that we only have privity with the prime.

I recommend that we remove the Bonding Requirements from Section H, delete the notice to proceed verbage and stress bonding between the prime and its sub.

/s/ ELIZABETH K. FALER
ELIZABETH K. FALER
Contract Specialist

3 August 1993

Meeting between Peter Hill (OA Attorney) and Elizabeth Faler

Topic: Bonding Requirement for Umatilla Switch Project

I explained to Peter Hill:

Verdan's Initial Proposal: As mentioned in a previous MFR, upon receiving the solicitation, Verdan asked if they would be permitted to have the subcontractor put Verdan's name on the bond that the sub obtains along with the contract number. I mentioned that this would need to be researched further. I didn't know if a surety would accept such a bond.

The DA Judge Advocate's Office said that they required bonds for construction projects. I mentioned to Peter Hill that I don't think they have a lot of interaction with 8(a) Service businesses. This is not a matter of financing a bond or having the government pay a larger price to have Verdan receive a bond. It is a matter of experience. Verdan has no experience in construction. They need to build on a background. Peter mentioned that the DA Judge Advocate is merely trying to protect the government's interest.

Ms. Witty, a SBA representative in Seattle, had mentioned that the sureties would not accept a bond with Verdan's name on it, unless the value of the bond was for a relatively low amount. She recommended that we waive our requirement for the bond and merely stress to the 8(a) how important it was for the sub

who will perform the construction portion to show Verdan their bond for the project.

Peter Hill's recommendation was that we make it a requirement in an amendment to have Verdan provide us with evidence that Verdan has received a bond from the sub for the construction portion of the project. He mentioned that as long as the value of the bond is greater than the IGE for the construction portion we'll be okay. If, however, it is less than the construction IGE, than the issue and bond value will need to be negotiated so that the entire negotiated price of the construction portion is bonded.

/s/ ELIZABETH K. FALER
ELIZABETH K. FALER
Contracting Specialist

MEMORANDUM FOR THE RECORD 20 August 1993

CALLER: JULIE MCFARLAND
SBA SEATTLE OFFICE
206 220-6541

CALLING: ELIZABETH FALER
ASPC-RA-SCM
717 878-5110

SUBJECT: REQUEST FOR IGE

MS MCFARLAND CALLED TO ENSURE THAT THEY WOULD GET COPIES OF THE IGE FOR THE UMATILLA PROJECT. I MENTIONED THAT VERDAN HAD COMPLETED THEIR PROPOSAL AND THAT THEY HAD SAID THEY WERE GOING TO DELIVER IT TO SBA ON THURSDAY AFTER IT WAS RETURNED FROM THE PRINTERS. SHE MENTIONED THAT SHE DIDN'T SEE IT YET (IT IS FRIDAY MORNING AROUND 1000 HOURS . . . SHE ASKED THE REST OF HER OFFICE IF THEY HAD SEEN THE VERDAN PROPOSAL THEY SAID NO. I SAID THAT THE PROPOSAL WAS DUE IN OUR OFFICE AT 1400 HOURS ON 19 AUGUST, BUT IT WASN'T SENT UNTIL THAT AFTERNOON WHICH MEANT THAT WE WOULDN'T GET IT UNTIL FRIDAY AROUND 1400 HOURS. I MENTIONED THAT THEY WERE SUPPOSED TO SEND IT TO SBA FIRST IF VERDAN WANTED THEIR ASSISTANCE, BUT THAT THE KO HAD TO HAVE SOMETHING FROM VERDAN IN OUR OFFICE BY COB 19 AUGUST, SO THEY FAXED US THEIR PROPOSAL ASAP THAT AFTERNOON. SHE ASKED ABOUT THE PROPOSAL. I SAID THAT THEY WERE UNDER THE IGE. SHE MENTIONED THAT THAT WAS WHAT THEY WERE WORRIED ABOUT. THEY DIDN'T

WANT COMPANIES PROPOSING TOO LOW OR TOO HIGH . . . WHICH IS WHY THEY SHOULD HAVE SEEN IT BEFORE IT WAS SUBMITTED TO US. I MENTIONED THAT IT WAS ONLY $40,000 BELOW WHICH WAS WELL WITHIN THE 15+/-% THAT WE WERE USUALLY CONCERNED WITH. I MENTIONED THAT THE PERFORMANCE EVALUATION BOARD WAS MEETING AS WE SPOKE SO THAT WE HAD TO HAVE THE PROPOSAL TODAY SINCE WE WERE WORRIED ABOUT MEETING YEAR END MILESTONES. SHE SEEMED SATISFIED WITH OUR OBSERVATIONS AND MERELY ASKED THAT WE KEEP HER INFORMED. THE IGE WAS FAXED TO MS. MCFARLAND AT 206 220-6570.

20 AUGUST 1993

THE PEB IDENTIFIED THAT THERE WERE MANY MISSING PIECES OF INFORMATION IN THE COSTING PROPOSAL. THE KO WAS BRIEFED AND MADE THE DECISION TO IMMEDIATELY FAX A REQUEST FOR A MORE DETAILED COST PROPOSAL WHICH WOULD PROVIDE THE GOVERNMENT WITH LABOR HOURS, MATERIAL AND EQUIPMENT LISTS, ETC. THE KO MENTIONED THAT THERE SIMPLY WERE "GROSS DEFICIENCIES" IN THE PROPOSAL WHICH WOULD NOT ALLOW US TO CONDUCT A PRICE REASONABLENESS DETERMINATION. THE LETTER WAS FAXED TO VERDAN AND A COPY WAS FAXED TO SBA SEATTLE, ATTN: MS. MCFARLAND.

20 August 1993

CALLER GARY TRUJILLO,
SBA SEATTLE DISTRICT OFFICE
206 220-6540

CALLING E. FALER
ASPC-RA-SCM
5110

SUBJECT: PROBLEMS SBA SEATTLE'S OFFICE SEES WITH VERDAN'S PROPOSAL

GARY TRUJILLO FROM THE SBA DISTRICT OFFICE CALLED TO IDENTIFY 3 PROBLEMS THAT HE SEES WITH THE PROPOSAL WHICH THEY JUST RECEIVED. HE MENTIONED 1) THE COSTING PROPOSAL WASN'T SPECIFIC ENOUGH 2) THE INCORRECT SIC CODE WAS USED AND 3) VERDAN NEEDS TO BE BONDED IF THE 1731 SIC CODE IS USED.

1) I MENTIONED THAT WE HAD ALREADY IDENTIFIED THE FACT THAT THE PROPOSAL NEEDED TO BE MUCH MORE SPECIFIC . . . IN FACT HE SHOULD BE RECEIVING A COPY OF OUR LETTER TO VERDAN ASKING FOR SPECIFIC DETAILS IN ORDER TO DO A PRICE REASONABLENESS DETERMINATION SINCE THERE WERE GROSS DEFICIENCIES IN THEIR PROPOSAL.

2) SIC CODES. SEE ATTACHED EXPLANATIONS OF SIC CODES 4813 WHICH WAS CHOSEN AND 1731 WHICH GARY T. THINKS IT SHOULD BE. HE MENTIONED THAT THE CORRECT SIC CODE SHOULD HAVE BEEN

1731 SINCE WE ARE NOT BUYING A SWITCH BUT MERELY INSTALLING ONE. I SAID THAT THE REQUIRING ACTIVITY WAS ASKED TO COME UP HERE TO SELECT THE SIC CODE AND THAT THEY CHOSE 4813. HE SAID THAT IF THE OFFER LETTER, WHICH WAS THE ORIGINAL LETTER SENT TO SBA, HAD MENTIONED THAT IT WAS GOVERNMENT FURNISHED EQUIPMENT THEN HIS OFFICE WOULD HAVE IMMEDIATELY CAUGHT IT AND CALLED US. HE READ FROM THE OFFER LETTER WHICH SAID THAT THE CONTRACTOR WAS, "TO CONSTRUCT A FACILITY TO HOUSE AN AT&T SWITCH AND THEN INSTALL AND TEST THE SWITCH AT UMATILLA ARMY DEPOT". HE SAID HIS OFFICE ASSUMED THAT THIS MEANT THEY WERE PURCHASING THE SWITCH AS WELL.

HE THEN TRIED TO SAY THAT THE MAJORITY OF THE PROJECT MAY BE CONSTRUCTION SO THAT THE SIC CODE WOULD BE SOMETHING ELSE. I SAID NO, THAT THE MAJORITY IN BOTH THE IGE AND THE CONTRACTOR'S PROPOSAL IS SERVICE.

HE SAID THAT IN ORDER TO CHANGE THE SIC TO 1731, THE "CORRECT" SIC, THAT HE COULD DO THAT NOW, AS WE SPOKE AND REFERENCE THE PHONE CALL. I SAID OKAY.

THE PROBLEM WITH CHANGING THE SIC CODE IS THAT THE COMPANY MUST PROVIDE A BID BOND FOR THE CONTRACT WITH THEIR PROPOSAL. I MENTIONED THAT WE HAD TALKED TO MS WITTY OF SBA SEATTLE FREQUENTLY ABOUT THIS MATTER AND THAT WE WERE INFORMED THAT VERDAN COULN'T POSSIBLY GET A BOND, THEREFORE, AFTER TALKING WITH HER, LEGAL EXPERT'S ETC. WE WERE TOLD THAT WE SHOULD IN ORDER TO PROTECT THE GOVERNMENT'S INTEREST, REQUIRE THAT VERDAN SHOW THE GOVERNMENT EVIDENCE THAT THEIR SUB HAS BONDED THE CONSTRUCTION PORTION OF THE CONTRACT. GARY WANTED TO KNOW WHO HAD GIVEN US THAT ADVICE. I SAID MS WITTY HAD ADVISED US OUT OF THE SBA OFFICE.

HE SAID THAT IT WAS AN SBA REQUIR[E]MENT THAT THE CONTRACTOR WITH AN SIC PROJECT NO. OF 1731 HAS TO FURNISH A BID BOND UNLESS IT IS WAIVED BY THE REQUIRING AGENCY. HE SAID IF WE WAIVED THE BONDING REQUIREMENT, THEN SBA WOULD PROBAB[L]Y WAIVE THEIR REQUIREMENT. I REITERATED THAT WE WERE TOLD BY MS WITTY THAT VERDAN DOESN'T HAVE THE EXPERIENCE TO GET A BOND IN THIS AREA. BESIDES EXPERIENCE, HE SAID THEY HAD TO MEET A CERTAIN FINANCIAL STATUS IN ORDER TO GET A BOND AND WHETHER THEY COULD BE BONDED WAS BETWEEN THE SURETY AND VERDAN.

HE MENTIONED THAT VERDAN IS LISTED UNDER THE 1731 AND 4813 SIC CODES.

I MENTIONED THAT I HAD TO BRIEF MY KO ON THIS INFORMATION.

20 August 1993

CALLER WM REUBEL
VERDAN
206 848-1843

CALLING E. FALER
ASPC-RA-SCM
5110

SUBJECT: VERDAN HAS RECEIVED OUR FAX LETTER REQUESTING ADDITIONAL COST AND MATERIAL LISTING INFORMATION

1530 HOURS. HE UNDERSTOOD THE NEED FOR DETAILED LABOR HOURS BUT DIDN'T UNDERSTAND THE ADDITIONAL MATERIALS AND EQUIPMENT LISTS REQUESTS. FOR EXAMPLE, IN THE PROPOSAL HE MENTIONED SPARE PARTS WOULD BE FURNISHED . . . THERE IS NO EXPLANATION OF WHAT PARTS, HOW MANY, ETC. HE SAID THEY WOULD GET ON IT ASAP.

HE THEN SAID THAT IT WAS 1:30 OR SO ON THE WEST COAST AND THAT HE DIDN'T THINK HE WOULD BE ABLE TO MEET THE SUB AND GET MORE DETAILED INFORMATION FROM HIM BEFORE 1000 HOURS EST WHEN WE WANTED THE INFORMATION. I SAID DO WHATEVER POSSIBLE TO GET THE INFORMATION, SEND WHAT INFORMATION THEY DO HAVE AND THEN IF THEY STILL HAVEN'T ANSWERED ALL THE MAIL ASK FOR AN EXTENSION ON MONDAY SPECIFYING HOW LONG THEY NEED. THE KO WILL HAVE TO MAKE THE DECISION AT THAT TIME.

20 August 1993

MEMORANDUM FOR THE RECORD

MEETING BETWEEN KO (MARY ANN KEYSER), REQUIRING ACTIVITY (RICK CAZAD) USAISEC-CONUS, AND E. FALER

SUBJECT: SIC CODES FOR UMATILLA PROJECT

1. I BRIEFED THE KO AND RICK CAZAD ABOUT THE PROBLEMS WHICH GARY TRUJILLO HAD IDENTIFIED. SHE GAVE THE SIC CODE BOOK TO THE REQUIRING ACTIVITY REPRESENTATIVE, RICK CAZAD. HE CONFIRMED THAT THE CODE SHOULD BE 4813. THE KO SAID SHE DIDN'T WANT THE SIC CODE CHANGED TO 1731. THE REQUIRING ACTIVITY WAS SATISFIED WITH 4813 AND TO NOTIFY SBA THAT SHE DIDN'T SEE HOW CHANGING THE SIC CODE TO 4813 WOULD OF BENEFIT TO THE GOVERNMENT AND THIS CONTRACT.

20 August 1993

CALLER: E. FALER
ASPC-RA-SCM
5110

CALLING GARY TRUJILLO
SBA SEATTLE DISTRICT OFFICE
206 220-6540

SUBJECT: SIC CODE

A MESSAGE WAS LEFT AT SBA DISTRICT OFFICE VIA GARY TRUJILLO'S ANSWERING SERVICE WHICH STATED THAT THE KO HAD BEEN BRIEFED ABOUT THE 4813 AND 1731 SIC CODES AND DID NOT CONCUR WITH THE CHANGE TO THE 1731. THE KO HAD IMMEDIATELY CONTACTED THE REQUIRING ACTIVITY, HAD SHOWN THEM BOTH DESCRIPTIVE PARAGRAPHS OUT OF THE SIC MANUAL AND THE REQUIRING ACTIVITY STILL SELECTED 4813. I LEFT WORD THAT I WOULD NOT BE IN THE OFFICE FROM THE 23-27 AUGUST, AND THAT HE SHOULD TALK WITH D. SCARLATA IN THE OFFICE IF HE HAD QUESTIONS ON MONDAY.

21 August 1993

CALLER GARY TRUJILLO
SBA SEATTLE DISTRICT OFFICE
206 220-6540
CALLING E. FALER
ASPC-RA-SCM
5110

SUBJECT: RETURNED PHONE CALL

UPON ARRIVING IN THE OFFICE SATURDAY, 21 AUGUST, I NOTICED THAT G. TRUJILLO HAD TRIED TO RETURN MY CALL REGARDING THE KO'S DECISION TO STAY WITH THE SIC CODE 4813. I WILL ASK THAT DARLA SCARLATA (OR WHOEVER THE KO APPOINTS) RETURN HIS CALL NEXT WEEK SINCE I WILL BE OUT OF THE OFFICE UNTIL 30 AUGUST.

/s/ ELIZABETH K. FALER
ELIZABETH K. FALER
Contract Specialist

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. CV95-00612-FR

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY,
DEFENDANT

AFFIDAVIT

State of Arizona
County of Cochise} ss..

Hildegard Choate, being duly sworn, deposes and says:

1. I am presently employed by the United States Army Information Systems Command at Fort Huachuca, Arizona.

2. That I am the contracting officer for contract DAEA 08-93-C-0056 and am presently the contracting officer for contract DAEA 08-94-C-0004. This affidavit is made pursuant to my review of the files associated with these contracts, and the documents

attached hereto are true and correct copies of the documents contained in those files.

3. That I made this affidavit in support of defendants' Cross Motion for Summary Judgment.

4. That Army contract DAEA 08-93-C-0056 was awarded to the Small Business Administration (SBA) for sub-contracting to Verdan Technology, Inc. The total amount of the contract was $430,879. The administration of that contract was handled directly between the Army and Verdan Technology, Inc. All payments under said contract were made directly from the Army to Verdan Technology, Inc. No money was ever transferred under this contract from the Army to the SBA. A copy of the contract's special 8(a) conditions are attached hereto as Exhibit A.

5. The Army designated the acquisition under Standard Industrial Classification Code (SIC Code) 4813, Telephone Communications. Condition K-14 is found on page K-9 of the contract, attached hereto as Exhibit B.

6. The contract did not require the 8(a) contractor to post a performance bond or payment bond, the original solicitation having been amended to delete the bonding requirement.

7. On or about January 3, 1995, the Army terminated contract DAEA 08-93-C-0056 for default because of Verdan's failure to adhere to the contract's delivery schedule for installation of the telecommunications equipment and to submit required contractor Data Requirements Lists. This termination included

both Verdan Technology, Inc. as subcontractor, and the SBA as prime contractor.

8. Contract DAEA 08-93-C-0056 consisted basically of two parts. One part was construction of a building to house telephone switching equipment and the installation of cable. The second part was the installation, testing, and putting on-line of that equipment.

9. During the contract, the Army disbursed $348,000 to Verdan. These disbursements were based on submitted invoices. No funds were held back or retained. $269,481.35 of the funds disbursed were for site preparation and construction of the housing facility. The original contract price for that portion of the project was $231,759.08. It appears that the additional $37,722.27 paid for construction was due to overcharges or misidentified charges made in the invoices submitted by Verdan.

10. After the Verdan contract DAEA 08-93-C-0056 was terminated, I chose contract DAEA 08-94-C-0004, already awarded to Dynamic Concepts, Inc., to finish the uncompleted portion of the Verdan contract. Modification P0006 (Exhibit C) was issued to finish this work.

11. The DCI contract was for administrative telephone services, to include operation and maintenance of the telephone switches at Umatilla.

12. Modification P0006 to the DCI contract was to enter the subscribing data base into the new telephone switch, testing and cutting over the new switch. It also included work not covered by the

Verdan contract, including installation of a sprinkler system and reinstalling the power and grounding panels in a flush-mounted fashion.

13. Modification P0006 to the DCI contract was for $126,772.78.

14. The Army paid for this modification by transferring the $84,910.52 left on the Verdan contract to the DCI contract. The balance was paid from other sources.

15. The contract between the Army and Verdan did not include retainage of money to ensure performance. The reason that a balance of $84,910.52 existed at the time Verdan was terminated was because the work had not been performed to entitle Verdan to payment.

/s/ HILDEGARD CHOATE
HILDEGARD CHOATE

STATE OF ARIZONA

COUNTY OF COCHISE ss:

Subscribed and sworn to before me this 29th day of February, 1996.

/s/ MARY EATON
Notary Public
My commission expires March 8, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil #95-612-FR

BLUE FOX, INC., A WASHINGTON CORPORATION,
PLAINTIFF

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; AND THE UNITED STATES DEPARTMENT OF THE ARMY,
DEFENDANTS

DECLARATION OF ERLINDA M. SAWYERS

I, ERLINDA M. SAWYERS, hereby declare as follows:

1. I am a contracting officer employed by the Seattle District Office of the Small Business Administration (herein "the SBA"), which is located at 1200 Sixth Avenue, Suite 1700, Seattle, Washington. I make this Declaration based upon personal knowledge or upon information officially furnished to me.

2. Verdan Technology, Inc. had been determined by the agency to be a socially and economically disadvantaged small business concern and was a participant in the SBA's Section 8(a) program at the time of contract award.

3. On or about September 29, 1993, the United States Army Information Systems Command (herein

"the Army") awarded Contract No. DAEA08-93-C-0056 to the SBA. The project involved the installation and testing of a switching system and the construction of a facility to house the switching system at the Umatilla Army Depot, Oregon. The contract, a copy of which is attached hereto as Exhibit A, is a tripartite contract in which SBA agreed to furnish the supplies or services requested by the Army by subcontracting with Verdan Technology, Inc.

4. Verdan Technology, Inc., for and on behalf of the SBA, was required to fulfill and perform all of the requirements of Contract No. DAEA08-93-C-0056 in accordance with Federal Acquisition Regulation 52.219-17 "Section 8(a) Award - Tripartite Contract (Feb 1990), a copy of which was part of the contract and attached hereto as Exhibit B. Contract DAEA08-93-C-0056 will be referred to herein as "the tripartite contract." The total amount of the contract was $430,879.

5. I signed the tripartite contract on behalf of the SBA on or about September 29, 1993.

6. The original solicitation issued by the Army required the contractor to furnish payment and performance bonds if the contract exceeded $25,000. However, on August 5, 1993 the Army issued an amendment to the solicitation deleting the performance and payment bonding requirements as to the contractor, Verdan Technology, Inc. The tripartite contract did not contain a requirement that the contractor furnish either a payment bond or a performance bond. A copy of the Amendment of Solicitation is a part of the SBA file on the tripartite contract and is attached hereto as Exhibit C.

7. A tripartite contract modification, effective May 16, 1994, was entered into by the parties which modified the scope of work and increased the total amount of the contract from $430,879. to $432,392.13. A copy of the modification, which is part of the SBA file on the tripartite contract, is attached hereto as Exhibit D.

8. By Modification of Contract effective January 3, 1995, the Army terminated the tripartite contract for default due to Verdan Technology, Inc.'s failure to adhere to the delivery schedule and its failure to deliver Contract Data Requirement Lists. A copy of the termination, which is part of the SBA file on the tripartite contract, is attached hereto as Exhibit E.

9. Under the terms of the tripartite contract, Verdan Technology, Inc. was to be directly paid by the Army. See Exhibit B attached hereto. The SBA did not receive any funds from the Army in connection with the tripartite contract. Furthermore, the SBA has never appropriated any funds for performance of the tripartite contract or any follow-on contract concerning the Umatilla Army Depot nor has it retained any funds in connection with the performance of the tripartite contract.

I verify under penalty of perjury, in accordance with 28 U.S.C. Section 1746, that the foregoing is true and correct.

EXECUTED on this 23 day of June, 1995.

/s/ ERLINDA M. SAWYERS
ERLINDA M. SAWYERS

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES
J	1 2

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
P00005	01/03/95		

6. ISSUED BY CODE c18

US ARMY INFO SYSTEMS COMMAND
OFFICE OF ACQUISITION 878-5203
ASPC-RA-SPR (MRS. ABRAHAM)
FORT RITCHIE MD 21719-5012
JoAnn Abraham C18(301) 878-5065

7. ADMINISTERED BY (If other than Item 6) CODE

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) Vendor ID: 00008522

VERDAN TECHNOLOGY, INC.
16715 MERIDIAN EAST
BUILDING G
PUYALLUP WA 98373

CODE FACILITY CODE

(X)	9A. AMENDMENT OF SOLICITATION NO.
	9B. DATED (SEE ITEM 11)
X	10A. MODIFICATION OF CONTRACT/ORDER NO. DAEA08-93-C-0056 Sub-contract 1013-93-2-00102
	10B. DATED (SEE ITEM 13) 09/18/93

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required) N/A

Mod Obligated Amount US $0.00

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(X)	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103 (b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
X	D. OTHER (Specify type of modification and authority) Termination for Default, FAR 52.249-8

E. IMPORTANT: Contractor ☒ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

The purpose of this modification is to terminate the contract for default.

Under the terms of the contract, F.4, FAR 52.212-0001 I, Time of Delivery, Verdan Technology, Inc. has failed, in accordance with the required delivery schedule, to deliver Contract Line Item Number 0002, Services to install, test and make operational the Government Furnished Equipment AT&T Electronic Switching System, in accordance with the Statement of Work. In addition, Verdan Technology, Inc. has failed to

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print) Richard Barron C36	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA BY Richard Barron (Signature of Contracting Officer)	16C. DATE SIGNED 1/9/95

deliver Contract Data Requirements List(s) identified in two Cure Notices and one Show Cause Notice.

Verdan Technology, Inc. rights to proceed further under the contract is terminated.

Supplies or services terminated may be purchased against Verdan Technology, Inc.'s, account, and Verdan Technology, Inc. will be held liable for any excess costs.

The Government reserves all rights and remedies provided by law or under the contract in addition to charging excess costs.

This notice constitute a decision that the contractor is in default as specified and a decision is made that failure to perform is not excusable and Verdan Technology, Inc. has the right to appeal such decision under the Disputes clause.

The amount of the contract remains unchanged.

(6)

FILED
AUG 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1642

In the Supreme Court of the United States

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
PETITIONER

v.

BLUE FOX, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

65 pp

QUESTION PRESENTED

The Administrative Procedure Act provides that any person "suffering legal wrong because of agency action" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. As amended in 1976, Section 702 also waives the government's sovereign immunity for such suits where they seek relief other than "money damages." Respondent in this case, a subcontractor on a federal project, was not paid the full amount due to it under its agreement with the prime contractor, and could not collect the unpaid amount from a surety because the prime contractor had not posted the payment bond required by federal law. The question presented in this case is:

Whether 5 U.S.C. 702 permits respondent to bring an action for an "equitable lien" against the government in order to recover from the government the amount of money the prime contractor owed to respondent, but failed to pay.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1642

THE UNITED STATES DEPARTMENT OF THE ARMY, PETITIONER

v.

BLUE FOX, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 121 F.3d 1357. The opinion of the district court (Pet. App. 21a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1997. A petition for rehearing was denied on November 7, 1997. Pet. App. 19a-20a. On January 27, 1998, and February 26, 1998, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to March 7, 1998, and then to April 6, 1998, and the petition was filed on the latter day. Certiorari was granted on June 26, 1998. 118 S. Ct. 2365. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, and relevant portions of Section 10 of the Administra-

tive Procedure Act, 5 U.S.C. 702-703, and the Miller Act, 40 U.S.C. 270a *et seq.*, appear in the appendix to this brief.

STATEMENT

1. As enacted in 1946, Section 10(a) of the Administrative Procedure Act (APA) entitled any "person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," to judicial review of that action. Act of June 11, 1946, ch. 324, 60 Stat. 243 (codified at 5 U.S.C. 702 (1970)). As originally enacted, however, the APA did not expressly waive the United States' sovereign immunity. Consequently, for decades the federal courts continued to develop a complex body of law concerning the application of sovereign immunity to suits challenging agency action. See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4-11 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 4-12 (1976). As then Assistant Attorney General Scalia explained to Congress, by the 1970s, "[n]o one c[ould] read the significant Supreme Court cases on sovereign immunity * * * without concluding that the field is a mass of confusion." H.R. Rep. No. 1656, *supra*, at 6; S. Rep. No. 996, *supra*, at 5.

In 1970, the Administrative Conference of the United States and the Administrative Law Section of the American Bar Association proposed that Congress simplify judicial challenges to agency action by amending 5 U.S.C. 702 to waive the United States' immunity to suits other than those seeking "money damages." See *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 3 (1970). Six years later, the proposal was enacted into law. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721. Thus, 5 U.S.C. 702 in its current form continues to declare that persons suffering legal wrong or aggrieved by agency action within the meaning of a relevant statute are entitled to judicial review thereof. Now, however, Section 702 also provides that any such action for judicial review—if it "seek[s] relief other than money damages"—shall not be dismissed nor relief therein be denied on the ground that the suit "is against the United States or that the United States is an indispensable party." 5 U.S.C. 702. Section 702 further qualifies that waiver of immunity with a proviso declaring that it neither affects "other limitations on judicial review," nor "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.*

2. In 1993, petitioner—the United States Department of the Army (Army)—contracted with Verdan Technology, Inc. (Verdan) to install a telephone switching system at an Army depot in Umatilla, Oregon. The final, modified contract price of $432,392.13 included the cost of constructing a facility to house the system, and installation and testing.[1] Verdan, in turn, retained respondent Blue Fox, Inc., as a subcontractor on the project. Pet. App. 2a-4a, 21a-22a. In return for respondent's agreement to construct a concrete block building to house the telephone system and to install certain safety and support systems, Verdan agreed to pay respondent $186,347.80. *Id.* at 4a, 22a.

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[1] The contract between the Army and Verdan was a product of Small Business Administration (SBA) efforts through Section 8(a) of the Small Business Act, 15 U.S.C. 637(a). Under that provision, SBA has established a business development program for firms deemed to be socially and economically disadvantaged. Through the Section 8(a) program, SBA contracts with government agencies to provide certain services or supplies, and then subcontracts those contracts to eligible firms. Pet. App. 2a. In this case, the Army awarded the telephone switching contract to SBA, and SBA in turn subcontracted with Verdan. *Id.* at 2a, 21a-22a. SBA, the Army, and Verdan signed a tripartite agreement under which SBA subcontracted with Verdan for performance on the contract, and then delegated responsibility for administering the contract to the Army. *Id.* at 2a-3a, 21a-22a. As a result, the Army was responsible for paying the contract amount— $432,392.13—to Verdan, and SBA did not receive any funds in connection with the contract. *Id.* at 2a-3a, 22a.

a. Under the Miller Act, 40 U.S.C. 270a *et seq.*, a contractor that performs "construction, alteration, or repair of any public building or public work of the United States" generally must post two types of bonds. 40 U.S.C. 270a(a). First, the contractor must post a "performance bond * * * for the protection of the United States" against defaults by the contractor. 40 U.S.C. 270a(a)(1). Second, it must post a "payment bond * * * for the protection of all persons supplying labor and material," 40 U.S.C. 270a(a)(2); the payment bond in effect guarantees payment by the prime contractor to subcontractors and other suppliers on the federal project.[2]

b. Although the Army's original solicitation required the contractor to furnish payment and performance bonds if the contract price exceeded $25,000, the Army later treated the contract as a services contract for which no bond was required. Pet. App. 3a, 22a. As a result, the Army's amended solicitation deleted any mention of a bond requirement, and Verdan did not post any Miller Act bonds. *Ibid.*

Although respondent was an experienced prime contractor and subcontractor on federal contracts, J.A. 25, it did not condition its subcontract with Verdan on proof that Verdan had posted a payment bond; nor did it ask Verdan or the Army to show that Verdan in fact had posted such a bond. *Id.* at 25-26. Instead, respondent simply assumed that Verdan had posted a payment bond, apparently because Verdan required respondent to post bonds for the protection of respondent's own subcontractors. *Ibid.*; Pet. App. 37a. As a result, respondent failed to learn that Verdan had not posted a payment bond until approximately June 15, 1994,

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[2] As originally enacted, the Miller Act required that bonds be obtained on contracts exceeding $2,000. Act of Aug. 24, 1935, ch. 642, 49 Stat. 793. In 1978, that figure was increased to $25,000. Act of Nov. 2, 1978, Pub. L. No. 95-585, 92 Stat. 2484. In 1994, after the events underlying this suit, the amount was increased to $100,000. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, Tit. IV, § 4104(b)(1)(A), 108 Stat. 3342.

after respondent had completed performance under its subcontract. Pet. App. 4a, 22a, 37a.

Verdan paid respondent $139,761.66 of the $186,347.80 owed on the subcontract, leaving $46,586.14 unpaid. Pet. App. 4a, 22a-23a. Respondent notified the Army on May 26 and June 15, 1994, that it had not been fully paid. *Id.* at 4a, 23a. After receiving those notices, the Army made additional disbursements to Verdan, totaling $86,132.33, for work performed. *Id.* at 4a. Before the project was completed, however, the Army terminated its contract with Verdan for various defaults, including failure to adhere to the contractual delivery schedule. *Id.* at 23a; J.A. 59, 65-66. At the time the Army terminated the contract, $84,910.52 in contract funds had not been disbursed to Verdan. Pet. App. 5a, 23a. That $84,910.52 had been designated for certain installation and testing tasks that Verdan failed to complete. *Id.* at 23a; J.A. 61. No funds due to Verdan for work actually performed had been held back or retained by the Army. Pet. App. 23a; J.A. 60, 61.

The Army then turned to Dynamic Concepts, Inc. (Dynamic) to complete the Umatilla project, modifying an existing contract with Dynamic to cover the project. Pet. App. 5a, 23a. Pursuant to that modification, the Army paid Dynamic $126,772.78. The Army used the undisbursed balance of $84,910.52 from the Verdan contract, plus approximately $42,000 from subsequent fiscal year funds, to pay for completion of the project. *Ibid.*; J.A. 21, 61; see J.A. 38-40.

3. Respondent filed suit against Verdan in the Tribal Court of the Yakima Indian Nation for breach of contract. In January 1995, respondent obtained default judgments against Verdan and its officers. Pet. App. 5a, 23a-24a. Respondent alleges, however, that it will not be able to collect on those judgments. *Id.* at 5a, 35a-36a. Accordingly, in May 1995, respondent filed suit against the Army, seeking to recover from the Army the $46,586.14 that Verdan owed

on the subcontract.[3] Predicating jurisdiction on 28 U.S.C. 1331 and the APA, 5 U.S.C. 702-704, 706, see Pet. App. 34a, respondent sought an "equitable lien" on any funds from the Verdan contract not paid to Verdan, or on any funds available or appropriated for completion of the Umatilla project, and an order directing payment of those funds to it, plus attorney's fees and interest. *Id.* at 38a-40a. Respondent also sought an injunction to prevent the Army from paying any more money on the Verdan contract or the follow-on contract with Dynamic until respondent was paid. *Id.* at 40a. Respondent did not move for preliminary relief, however, and the Army eventually paid Dynamic all of the funds remaining from the Verdan contract, plus additional funds, once Dynamic completed its work. Pet. App. 5a n.3, 23a.

4. The district court granted summary judgment in the Army's favor. Pet. App. 31a. The court reasoned that the APA waives the government's immunity only with respect to relief other than money damages. "[T]he question is," the court continued, "whether [respondent] seeks money damages for a loss suffered, or whether [respondent] seeks funds to which it is entitled by statute." *Id.* at 28a. Respondent premised its suit on the allegation that the Army had erred in failing to require Verdan to post a Miller Act bond. *Id.* at 24a, 37a. But even if the Miller Act required that a bond be posted, the district court reasoned, the "Army had no contractual obligation or statutory obligation to pay [respondent]. The Miller Act neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract." *Id.* at 29a. As a result, the relief respondent was seeking did not constitute enforcement of a statutory obligation. Instead, it constituted an award of the "money damages [respondent] suffered when Verdan failed to pay [respondent] in full." *Id.* at 30a. The court therefore concluded that "[t]he waiver of sovereign immunity provided by the APA does not apply to the claim of [respondent] against the Army." *Ibid.*

[3] See Pet. App. 33a-40a (Complaint); see also *id.* at 24a. Although respondent also named SBA as a defendant, the district court granted summary judgment in SBA's favor, Pet. App. 31a, and the court of appeals affirmed, *id.* at 12a-14a. Respondent has not sought review of that ruling.

5. a. The Ninth Circuit reversed in relevant part. Pet. App. 1a-18a. The panel majority acknowledged that the APA could provide the necessary waiver of sovereign immunity only if respondent sought relief other than money damages. *Id.* at 6a. The majority concluded, however, that the monetary relief respondent sought constituted specific relief and not money damages. According to the Ninth Circuit:

> Here, [respondent] seeks an equitable lien only for the very thing to which it is entitled under the contract. [Respondent] does not seek any consequential damages to compensate losses suffered beyond the contract price. Therefore, the district court had jurisdiction to consider its claim under the APA.

Pet. App. 7a.

The court of appeals explained its conclusion in two steps. First, the court read *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), as holding that 5 U.S.C. 702 waives the United States' immunity against actions for "specific relief," which the court read as synonymous with "equitable relief" or relief awarded in "equitable actions." See Pet. App. 7a-8a ("[T]he APA waives immunity for equitable actions."); *id.* at 10a ("Any equitable rights held by subcontractors as against [the federal agency] which may have been unenforceable where sovereign immunity existed, became enforceable upon immunity being waived."). Second, the court examined whether an equitable lien constitutes "equitable relief," and determined that it does. *Id.* at 8a-11a; see *id.* at 10a ("[E]quitable liens are properly characterized as equitable remedies * * *."). Because it concluded that Section 702 waives the United States' immunity for all equitable actions

or remedies, and that a claim for an equitable lien is an equitable action seeking an equitable remedy, the court of appeals held that a suit for an equitable lien falls within the scope of the waiver of immunity in Section 702. Pet. App. 8a-9a; see *id.* at 10a ("[S]uch equitable liens are properly characterized as equitable remedies, rather than money damages.").

The court of appeals also rejected the district court's conclusion that a monetary remedy may constitute "specific relief" permissible under Section 702 only where the plaintiff seeks to enforce a statutory right to payment. Pet. App. 7a-8a. Citing *Aetna Casualty and Surety Co.* v. *United States*, 71 F.3d 475, 479 (2d Cir. 1995), the court held that "there is no requirement in *Bowen* or the APA that the specific relief requested be statutorily granted. That is, a party need not rely upon a statute in order to obtain federal court jurisdiction [over a claim for monetary relief] under the APA." Pet. App. 8a.

b. Judge Rymer dissented. Pet. App. 14a-18a. "Never before," she observed, "has a court held that a subcontractor may sue an agency of the United States, which has not agreed to be sued, for contract monies that the prime contractor should have paid to the subcontractor but didn't." *Id.* at 14a. For decades, she pointed out, courts had uniformly rejected subcontractor claims against the government. *Ibid.* Now, however, the majority had upset that settled law in contravention of the terms of Section 702. "[N]o matter how you slice [respondent's] claim," Judge Rymer explained, "it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond," and "the law is well settled that this may not be done unless the contracting agency has agreed to be sued * * *." Pet. App. 14a-15a.

Judge Rymer further explained that Congress had protected subcontractors by requiring prime contractors to post payment bonds under the Miller Act. Pet. App. 15a. Where

such bonds were not posted, however, "neither the Federal Tort Claims Act, the Miller Act nor the Tucker Act, waives sovereign immunity to permit a subcontractor to sue the United States directly in its own right for monies the subcontractor should have received, but did not receive, from the prime contractor." *Ibid.* "[I]n the absence of an agency waiver," Judge Rymer explained, "subcontractors cannot achieve 'by indirection a result that they could not reach directly under the Miller Act.'" Pet. App. 16a.

Judge Rymer also disagreed with the majority's conclusion that 5 U.S.C. 702 permits monetary relief whenever the action or remedy is "equitable." *Id.* at 17a. Instead, she reasoned, the APA's waiver permits monetary awards only if "the government has a duty" to pay money "which can be specifically enforced." *Id.* at 16a. In this case, she concluded, the government "has none." *Ibid.* Although in her view the Army should not have approved the Verdan contract absent the posting of an adequate surety bond—and the absence of the bond is what "caused [respondent's] loss"—requiring the Army to pay money to respondent was simply one way of giving respondent the "money damages" remedy that the APA proscribes. *Id.* at 16a-17a.

SUMMARY OF ARGUMENT

The federal government cannot be sued in the absence of an express waiver of sovereign immunity, and any such waiver must be narrowly construed. The waiver of immunity in 5 U.S.C. 702 permits claims for "judicial review" of "agency action" to be brought against the United States, but only where they seek relief "other than money damages." By holding that Section 702's waiver of immunity permits unpaid subcontractors to obtain an equitable lien on funds in the United States Treasury, the Ninth Circuit provided relief that Section 702 does not allow.

I. A. Although Section 702 waives the United States' sovereign immunity in part, it excludes suits seeking "money

damages" from the scope of the waiver. In *Bowen* v. *Massachusetts*, 487 U.S. 879, 893, 895 (1988), this Court held that a suit is for "money damages" if it seeks a monetary remedy as "compensation for an injury to [the claimant's] person, property, or reputation," or otherwise requests money to "substitute" for a legal duty the government breached. A monetary remedy, however, may not be a prohibited award of "money damages"—and may instead constitute "specific relief" permitted by Section 702—if it "give[s] [the claimant] the very thing to which he was entitled" from the government in the first instance. 487 U.S. at 895 (internal quotation marks omitted).

B. Under this Court's precedents, a plaintiff is entitled to money from the Treasury only if Congress by law expressly so directs. *OPM* v. *Richmond*, 496 U.S. 414, 416, 424, 432 (1990). As a result, money from the Treasury cannot be the "very thing to which [the plaintiff] was entitled" from an agency—and therefore must constitute "money damages"—unless the plaintiff identifies a specific statute that obligated the agency to pay the plaintiff public funds from the Treasury in the first place. In *Bowen*, Massachusetts sought to enforce such a statutory payment mandate; there, the State sought an order compelling compliance with a clause in the Medicaid Act providing that the Secretary of Health and Human Services "shall pay" for covered services. Absent such a statutory payment mandate, however, courts may not create new substantive rights to money in the Treasury based on their own notions of equity.

C. Respondent can identify no applicable statutory money-payment obligation. Although respondent's claim rests primarily on the Army's alleged violation of the Miller Act, 40 U.S.C. 270a *et seq.*, that statute does not require the payment of federal funds to subcontractors. At most, it requires federal agencies (including the Army) to ensure that prime contractors like Verdan post payment bonds for the protection of subcontractors like respondent. But if

ensuring the posting of a bond is the statutory duty the Army breached, then the money respondent seeks cannot be "specific relief"—and must be money damages—because it does not give respondent "the very thing to which [it] was entitled," *i.e.*, Army action to ensure that the contractor posts a payment bond from a qualified surety. Instead, it gives respondent a "substitute" award that compensates respondent for the losses it suffered when no bond was posted. Such substitute monetary remedies are barred by the "money damages" prohibition of Section 702.

The Ninth Circuit's reliance on an "equitable lien" is similarly deficient. Congress has nowhere recognized "equitable liens" as a proper basis for imposing payment obligations on the Treasury. Absent statutory authorization, courts are prohibited from creating new rights to funds in the Treasury through the invocation of judically-developed equitable principles. *Richmond*, 496 U.S. at 416, 424, 432.

D. The Ninth Circuit's construction of Section 702, as authorizing the imposition of new payment obligations so long as they are "equitable," is inconsistent with the text and history of that provision. As the Third and D.C. Circuits (and the district court below) have recognized, Section 702 does not by its terms open the Treasury to monetary liability on any substantive basis so long as it is "equitable" in nature. To the contrary, Section 702 preserves the longstanding rule that no person is entitled to money from the Treasury except as Congress specifically directs. "Nothing herein," Section 702 declares, "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. The legislative history of the 1976 amendment likewise demonstrates that Congress did not intend to license federal courts to create and then enforce non-statutory entitlements to federal funds whenever the claim or relief can be characterized as "equitable." Instead, it

shows that Congress contemplated no additional monetary liability, and expected actions like this one to be barred.

E. The Ninth Circuit's theory that a payment obligation may arise under the federal common law through an equitable lien is not supported by this Court's cases. This Court has uniformly held that the payment obligations of the Treasury arise from Acts of Congress, not from judicial doctrines articulated by the courts. None of the decisions of this Court relied upon by the Ninth Circuit recognizes a common-law or equitable right to federal Treasury funds *vis-à-vis* the federal sovereign.

II. The Ninth Circuit's decision misconstrues the nature of "judicial review" of "agency action" for which the 1976 amendment to Section 702 partially waives the United States' immunity. A common-law claim for an "equitable lien" is not a suit challenging "agency action"; nor does it constitute a suit seeking "judicial review." Moreover, recharacterizing respondent's suit to identify the purported "agency action" being subjected to "review" reveals that the monetary relief respondent seeks is in fact a prohibited award of money damages.

III. Finally, Section 702 bars suit under the APA if another statute that consents to suit "expressly or impliedly forbids" the relief that is sought. 5 U.S.C. 702. Both the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, and the Miller Act, 40 U.S.C. 270a *et seq.*, grant consent to suit in this context, and they impliedly preclude the "specific" monetary relief that respondent seeks.

ARGUMENT

RESPONDENT'S SUIT FOR AN "EQUITABLE LIEN" IS NOT AUTHORIZED BY 5 U.S.C. 702

Prior to the decision below, no court had ever held that the United States and its agencies are obligated to pay public funds to subcontractors on federal projects, under an equitable lien theory or any other, whenever the prime contractor that should have paid the subcontractor failed to do so. Pet. App. 14a (Rymer, J., dissenting). To the contrary, "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947). Just as "[t]hey cannot acquire a lien on public buildings," *ibid.*, they cannot obtain liens on public funds.

In this case, the Ninth Circuit held that the partial waiver of sovereign immunity inserted into the Administrative Procedure Act (APA) in 1976 altered that settled rule. According to the Ninth Circuit, the waiver of immunity in 5 U.S.C. 702 subjects the United States to monetary liability based on any substantive source of law so long as the cause of action or relief, such as the "lien" in this case, is characterized as "equitable." The Ninth Circuit's decision misconstrues the "money damages" exclusion of Section 702, misperceives the nature of "judicial review" of "agency action" authorized by Section 702, and offers relief that other statutes forbid.

I. BECAUSE RESPONDENT'S SUIT SEEKS "MONEY DAMAGES," IT IS OUTSIDE THE SCOPE OF THE WAIVER OF IMMUNITY IN 5 U.S.C. 702

It is a fundamental principle of sovereign immunity that a court has no jurisdiction over claims against the United States unless Congress by statute expressly and unequivocally waives the United States' immunity to suit. See *United*

States v. *Mitchell*, 463 U.S. 206, 212 (1983). Moreover, when the United States does consent to be sued, "the terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), and any such waiver must be strictly construed in favor of the sovereign, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).

By declaring that a claim seeking judicial review of agency action shall not "be dismissed nor relief therein be denied on the ground that it is against the United States," the 1976 amendment to the APA undeniably effected a limited waiver of immunity. *Bowen* v. *Massachusetts*, 487 U.S. 879, 891-892 (1988). That waiver, however, extends only to claims seeking relief "other than money damages." 5 U.S.C. 702. Because it is "money damages" that respondent seeks from the Army in this case, the district court was correct to dismiss this suit.

A. An Award Of Money From The Treasury Is "Specific Relief" Rather Than "Money Damages" Only If Public Funds Are The Very Thing To Which The Plaintiff Was Entitled From The Government In The First Instance

In *Bowen* v. *Massachusetts*, this Court considered the meaning of Section 702's exclusion for suits seeking "money damages." There, the Secretary of Health and Human Services had issued a final order declining to reimburse Massachusetts for certain expenses under its Medicaid Program, and the State brought suit seeking to "set aside" that order. Rejecting the United States' contention that the suit was for "money damages," the Court explained that suits for "money damages" stand in contradistinction to suits which are in the nature of "an equitable action for specific relief." 487 U.S. at 893; see also *id.* at 897. The former provides the "victim with monetary compensation for an injury to his person, property, or reputation," while the latter merely forces the defendant

to undertake action, such as the return of property to which the plaintiff is entitled. *Id.* at 893.

"The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" 487 U.S. at 893. Instead, the Court observed:

> The term "money damages," 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not *substitute* remedies at all, but attempt to give the plaintiff the very thing to which he was entitled."

Id. at 895 (quoting *Maryland Dep't of Human Resources* v. *HHS*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.) (quoting in turn D. Dobbs, *Handbook on the Law of Remedies* 135 (1973))).

Applying that analysis, the Court in *Bowen* held that the suit before it did not seek "money damages." The Medicaid statute on which the suit was based expressly imposed a money-payment mandate, declaring that the Secretary "shall pay" certain sums when specified conditions are met. 487 U.S. at 900. Consequently, the State did not seek "money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [sought] to enforce the statutory mandate itself, which happens to be one for the payment of money." *Ibid.*; see also *id.* at 895, 907 (State "is seeking funds to which a statute allegedly entitles it" (quoting *Maryland Dep't of Human Resources*, 763 F.2d at 1446)). Thus, in *Bowen*, money from the Treasury constituted "specific relief" rather than "money damages" because the plaintiff alleged that a specific statute entitled it to the funds that the agency had denied it.

Bowen did not hold, however, that money from the Treasury could be "the very thing to which [the claimant] was entitled"—and thus "specific relief" rather than "money

damages"—in the absence of an express statutory mandate directing an agency to pay money to the claimant. To the contrary, as we demonstrate below, only an Act of Congress can impose a substantive obligation to pay money from the Treasury, and thus only an Act of Congress can make money from the Treasury "the very thing" to which a claimant is entitled in a suit against a federal agency under the APA.

B. Money From The Treasury Is Not The Very Thing To Which A Plaintiff Is Entitled From An Agency Unless Congress Has Recognized A Payment Obligation In The Explicit Terms Of A Federal Statute

Federal courts, as courts of limited jurisdiction, do not have power or authority to create entitlements to federal funds according to their own principles of equity. To the contrary, even where immunity has been waived to permit judicial review, "payments of money from the Federal Treasury are limited to those authorized by statute." *OPM* v. *Richmond*, 496 U.S. 414, 416 (1990); cf. *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (courts may not award damages against a federal agency absent "a waiver of sovereign immunity" and a "source of substantive law * * * [that] provides an avenue for relief").[4] As a result, money from the Treasury cannot be "the very thing to which [a claimant] was entitled" from a federal agency in the first instance—and thus "specific relief" rather than "money damages" in a suit under Section 702—unless the claimant's

[4] Throughout this brief, we use the terms "Act of Congress" and "statute" as shorthand terms to encompass positively enacted sources of law, as opposed to judicially-created (common-law) sources. They thus include self-executing provisions of the Constitution, federal statutes, and possibly administrative regulations, to the extent they have the force and effect of law, are funded, and are adopted pursuant to an Act of Congress that authorizes the agency to articulate an obligation to pay money. See *Atchison, T. & S.F. Ry.* v. *Scarlett*, 300 U.S. 471, 474 (1937) (regulation has "the same force as though prescribed in terms by the statute").

lawsuit seeks to enforce a *statutory* mandate for the payment of money.

1. This Court's cases resonate with that theme. In *OPM* v. *Richmond*, for example, this Court held that, once the claimant became statutorily ineligible for certain benefits, a federal court could not order the payment of benefits under the doctrine of "equitable estoppel." There, as here, a partial waiver of sovereign immunity permitted a direct suit against the government. See 5 U.S.C. 7703(a)(1). Nonetheless, this Court held that only an Act of Congress, and not naked principles of equity, could establish a substantive entitlement to federal funds. "[T]he payment of money," the Court declared, "must be authorized by a statute." 496 U.S. at 424; see *id.* at 416 ("We hold that payments of money from the Federal Treasury are limited to those authorized by statute * * *."). And the Court reiterated that point in rejecting the claimant's argument that his benefits could be paid from the Judgment Fund, rather than from the benefits appropriation, stating: "[F]unds may be paid out," even from the Judgment Fund, "only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Id.* at 432.

This Court had applied the principle articulated in *Richmond* more than a century before *Richmond* was decided. In *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846), for example, this Court relied on that principle to hold that pay due to federal employees (in that case, seamen of the frigate Constitution) from the Treasury could not be garnished or attached by creditors. The "money in the hands of the purser * * * due to seamen for wages," the Court reasoned, constituted "public money," *id.* at 20; "[s]o long as the money remains in the hands of the disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury," *id.* at 20-21. Because those wages constituted public funds, the Court held, they could not be paid out on the basis of rights or obligations other than those

created or recognized by Congress itself. "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." *Id.* at 20.

Thirty-one years after deciding *Buchanan*, the Court again applied that principle. In *Knote* v. *United States*, 95 U.S. 149, 154 (1877), the President asserted that, through his pardon power, he could require the return of forfeited funds to their former owners. This Court held otherwise. "[I]f the proceeds [of the seizure] have been paid into the treasury," the Court held, then "the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress." *Ibid.* Only six years ago, this Court applied that same rule yet again in *Republic National Bank* v. *United States*, 506 U.S. 80 (1992), this time holding that the Judiciary, no less than the President, lacks power to order the return of forfeited funds absent appropriate legislation. *Id.* at 94 (opinion of the Court delivered by Rehnquist, C.J.). There, however, the Court did identify a statute permitting that relief: Congress had authorized the return of seized property and enacted a specific appropriation therefor.[5]

2. The rule that money may be paid from the Treasury only on the basis of payment obligations recognized by Acts of Congress flows directly from the Constitution. Under our system of separated powers, federal courts do not make fiscal policy. Nor do they have authority to allocate resources of the United States based on judicial notions of

[5] See 28 U.S.C. 2465 ("Upon entry of judgment for the claimant * * * such property shall be returned forthwith to the claimant or his agent * * *."); *Republic Nat'l Bank*, 506 U.S. at 95-96 (appropriation provided by 28 U.S.C. 1304, 2414, and 2465); *id.* at 90-91 (Blackmun, J., joined by Stevens and O'Connor, JJ.) (28 U.S.C. 2465's requirement that the property "be returned forthwith" is a sufficiently "specific" appropriation of funds.).

equity or fairness. The Appropriations Clause, Art. I, § 9, Cl. 7, provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *." As this Court has explained, the Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 496 U.S. at 428; see 2 J. Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858) (object of the Clause "is to secure regularity, punctuality, and fidelity, in the disbursements of public money"); see also *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937).

Because the Constitution expressly allocates the power of the purse to Congress, courts properly decline to create or recognize an obligation to pay money from the Treasury except as Congress by law directs. Thus, even though the Tucker Act, 28 U.S.C. 1491, expressly grants the Court of Federal Claims jurisdiction over certain monetary claims against the United States, it does not follow that Tucker Act plaintiffs may obtain money from the Treasury regardless of the substantive basis for their claims. *United States* v. *Testan*, 424 U.S. 392, 400 (1976). Instead, a Tucker Act plaintiff must assert a claim based on one of the substantive sources of law the Tucker Act itself identifies, *i.e.*, a claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491(a)(1). And the plaintiff "must demonstrate" that the statutorily-recognized "source of substantive law he relies upon can fairly be interpreted as *mandating* compensation by the Federal government for the damage sustained." *United States* v. *Mitchell*, 463 U.S. at 216-217 (internal quotation marks and footnotes omitted)

(emphasis added); *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (1967)); see also *Meyer*, 510 U.S. at 484 (agency's sue-and-be-sued clause does not, in and of itself, allow a claim for money without an entitlement from a source of substantive law).

Thus, where a plaintiff relies on an "express or implied contract" as the substantive source of law for his Tucker Act claim, the plaintiff must show that he has a valid and binding contract with the government—*i.e.*, a contract that is authorized by statute and properly funded—and that federal principles of contract law entitle him to compensation. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-386 (1947); *Hooe* v. *United States*, 218 U.S. 322 (1910). And where a Tucker Act plaintiff seeks money based on the violation of an Act of Congress, he must show that the Act "in itself can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 402 (internal quotation marks omitted). Indeed, the "grant of a right of action" for damages "must be made with specificity," *id.* at 400, and no monetary award against the United States based on the Constitution, an Act of Congress, or a regulation is permissible *unless* the relevant source of law "specifically authorize[s] awards of money damages." *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 739-740 (1982); see also *id.* at 741 (Tucker Act claim cannot be predicated on "regulations * * * which do not explicitly authorize damages awards").

3. Congress knows how to create monetary liability on the part of the United States and authorize courts to award monetary relief. For example, as described above, it has statutorily authorized certain federal officials to enter into contracts on its behalf and, through the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, made the United States amenable to damages awards based on "express or implied contract[s]." Similarly, the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671, *et seq.*, declares that the "United States shall be liable

* * * to tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain exceptions. Finally, where Congress chooses to subject a federal instrumentality like the Postal Service to monetary liability more generally as if it were a private party, it declares without qualification that the instrumentality may "sue and be sued." See *Franchise Tax Board* v. *United States Postal Serv.*, 467 U.S. 512 (1984). By so declaring, Congress may evince an intent to "launch[] [the instrumentality] into the commercial world," making its amenability to suit and its "liability" in commercial matters largely "the same as any other business." *Id.* at 520 (internal quotation marks omitted).[6]

When Congress amended the APA in 1976 to waive the United States' immunity to certain suits for judicial review of agency action, it did not similarly launch federal agencies into the commercial world, and it did not utilize language similar to that of the Tucker Act or the FTCA. Instead, Congress simply declared that an otherwise proper suit seeking judicial review of agency action "shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. 702.

The 1976 amendment to Section 702 thus is "purely procedural in nature." S. Rep. No. 996, 94th Cong., 2d Sess. 19 (1976). Unlike the FTCA and the Tucker Act, it does not identify any substantive source of law that could in turn be the basis for the imposition of money-payment obligations on the Treasury, and of course it expressly preserves the government's immunity to "money damages." Nor does the 1976 amendment appropriate funds to satisfy any judgments

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[6] Given the federal interests involved, the agency's liability still depends on federal rather than state law. See E. Chemerinsky, *Federal Jurisdiction* § 6.2.2, at 303-304 (1989) (federal jurisdiction and federal law necessary to protect federal property interests). Moreover, the plaintiff must always find a cause of action that operates against federal governmental entities. *Meyer*, 510 U.S. at 484.

that might result. Simply put, nothing in Section 702 evidences an intent to impose new substantive obligations to pay money from the Treasury.

Because Section 702 does not itself impose substantive money-payment obligations, anyone demanding public money in reliance on the waiver of immunity contained therein must locate a right to the funds in the express terms of some *other* federal statute. *Richmond*, 496 U.S. at 416, 424, 432; *Mitchell*, 463 U.S. at 216-217 (where statute "does not create any substantive right enforceable against the United States," the "substantive right must be found in some other source of law" (internal quotation marks omitted); *Testan*, 424 U.S. at 398-400 (if provision "is itself only a jurisdictional statute" and "does not create any substantive right against the United States" for money, plaintiff must locate the entitlement in another provision). Just as federal courts cannot enter judgments awarding money from the Treasury as compensatory damages except "on the basis of * * * a substantive right to compensation" recognized in "the express terms of a specific statute," 496 U.S. at 432, so too they cannot order payments from the public fisc as "specific relief" under Section 702 absent an equally explicit statutory money-payment mandate. As Judge Rymer observed in dissent below, unless there is a statutory money-payment mandate, "the government has [no] duty" to pay that "can be specifically enforced." *Id.* at 16a.

For that reason, the Third Circuit was correct to hold that "the crucial distinction" between a suit for monetary "specific relief," which is permitted by 5 U.S.C. 702, and an action for "money damages," which is not, is that the former "seek[s] funds *to which a statute* allegedly entitles" the plaintiff, while the latter demands "money for the losses * * * suffered by virtue of the agency's failure to do that which it was required to do." *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1267 (1994) (emphasis added;

internal quotation marks omitted); see also Pet. App. 28a (district court opinion) ("Here, the question is whether [respondent] seeks money damages for a loss suffered, or * * * funds to which it is entitled by statute."); *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 536 (D.C. Cir. 1992) ("*Bowen's* holding * * * does nothing for [plaintiff's] cause" because plaintiff's "basic claim is not for enforcement of any legal mandate that the EPA pay him a sum of money; rather, it is to force the EPA to offer him the job it denied him."). Consequently, where a plaintiff does not allege a statutory entitlement to public funds, money from the Treasury is not "the very thing to which [it] was entitled" from the federal agency. *Bowen*, 497 U.S. at 900.

C. Because No Statute Entitles Respondent To Federal Funds, Its Claim For Monetary Relief Is Barred As An Action For Money Damages

In *Bowen*, Massachusetts sought specific relief to enforce a statutory payment mandate. The Medicaid Act provision at issue there declared that "[f]rom the sums appropriated therefor * * * the Secretary * * * *shall pay* to each State" certain sums for covered medical services. 42 U.S.C. 1396b(a) (emphasis added). Because Massachusetts sought review of an administrative decision under an Act of Congress directing the agency to pay money for covered services, this Court upheld its suit as an action for "specific relief"; the claim, the Court explained, merely sought "to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900. The same cannot be said of respondent's suit here.

1. Although the Ninth Circuit majority did not identify the "agency action" that injured respondent and was being subjected to "judicial review," see pp. 43-47, *infra*, the only purportedly wrongful government conduct identified was the Army's alleged violation of the Miller Act, 40 U.S.C. 270a *et seq.* In particular, the Army failed to require the posting

of a Miller Act payment bond which, respondent asserts, would have protected it from Verdan's default. Pet. App. 24a, 37a; see also *id.* at 3a, 13a.

The Miller Act, however, nowhere directs government agencies to pay money to subcontractors. Instead, it requires prime contractors that perform "construction, alteration, or repair of any public building or public work of the United States" to post a "payment bond * * * for the protection of all persons supplying labor and material." 40 U.S.C. 270a(a)(2). Because the Miller Act places responsibility for obtaining a bond on the prime contractor and not the government, it arguably imposes "no affirmative obligations on the government" at all. *Arvanis* v. *Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1290 (7th Cir. 1984), cert. denied, 469 U.S. 1191 (1985); Pet. App. 29a (district court opinion) ("The Miller Act neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract.").

In any event, if ensuring that prime contractors post Miller Act bonds is a duty that the Army allegedly breached, then the money award respondent seeks here cannot be "specific relief"—and must be money damages—because it does not give respondent "the very thing to which [it] was entitled," *i.e.*, action by the Army to assure that the prime contractor posts a payment bond from a qualified surety. Instead, the monetary remedy imposed by the Ninth Circuit gives respondent the paradigm of "money damages"—substitute relief in the form of money to compensate respondent for the loss it suffered when the Army failed to do what it allegedly should have done. As the dissent observed, "no matter how you slice [respondent's] claim, it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond." Pet. App. 14a (Rymer, J., dissenting); compare *Department of the Army* v. *FLRA*, 56 F.3d 273, 276 (D.C. Cir. 1995) (successful challenge to agency action for failure to provide required

notice entitles employees only to "specific relief" in the form of proper notice, since "proper notice," not greater compensation, "was the thing to which * * * employees were entitled").

In any event, it could not be clearer that the Miller Act imposes no substantive obligation to pay federal funds to subcontractors. For more than a century, Congress and the courts have recognized that subcontractors have no enforceable rights against the United States and cannot obtain workers' or materialmen's liens on federal property if they are not paid. As this Court declared in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947), "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation."[7]

To provide relief from the harsh effects of that rule without harming the government's financial interests, Congress in 1894 enacted the Heard Act, ch. 280, § 1, 28 Stat. 278. Under the Heard Act, any person entering into a formal contract with the United States for construction or repair of a public building or public works was required to execute the "usual penal bond, with good and sufficient sureties," and to "promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." *Ibid.* An unpaid subcontractor was authorized to "bring suit" on the bond "in the name of the United States for his or their use and benefit against said

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[7] See, *e.g.*, *Hill* v. *American Surety Co.*, 200 U.S. 197, 203 (1906) ("As against the United States, no lien can be provided upon its public buildings or grounds."); *Buchanan*, 45 U.S. (4 How.) at 21 (money retained by the government for the benefit of its employees may not be reached by employees' creditors unless Congress specifically authorizes it); see also H.R. Rep. No. 97, 53d Cong., 1st Sess. (1893) (report on Heard Act, predecessor to the Miller Act, as discussed pp. 25-26, *infra*) (observing that "there is no law now in existence for the protection of mechanics and material-men in this class of cases, as it is contrary [to law] to allow mechanics' or material-men's liens on public buildings or public works").

contractor and sureties * * * *Provided*, [t]hat such action and its prosecutions shall involve the United States in no expense." The Heard Act thus sought to "substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual," a substitution made necessary by the fact that "no lien can be provided upon" federal property. *Hill* v. *American Sur. Co.*, 200 U.S. 197, 203 (1906).

In 1935, Congress repealed the Heard Act and replaced it with the Miller Act, 49 Stat. 793, ch. 642, 40 U.S.C. 270a *et seq.* The Miller Act, like the Heard Act, requires contractors on specified federal construction contracts to post a payment bond to protect subcontractors. 40 U.S.C. 270a(a)(2). And the Miller Act, also like the Heard Act, affords unpaid subcontractors the right to sue on the payment bond "in the name of the United States for the use of the person suing," 40 U.S.C. 270b(a), (b), without creating any rights in the subcontractor *vis-à-vis* the government. Indeed, Section 270b(b) expressly states that "[t]he United States shall not be liable for the payment of any costs or expenses of any such suit." While Congress has amended the Miller Act periodically, and has authorized specified agencies to waive Miller Act requirements under certain circumstances,[8] Congress has never altered the settled rule that subcontractors do not have enforceable rights against the United States for funds that their contractors fail to pay them.

In light of the plain terms and history of the Miller Act, courts of appeals have universally rejected attempts by unpaid subcontractors to recover from the government, whether those claims were asserted under the FTCA,[9] the

[8] See *e.g.*, Act of Apr. 29, 1941, ch. 81, 55 Stat. 147; Act of June 3, 1955, Pub. L. No. 60, 69 Stat. 83; Act of Nov. 2, 1966, Pub. L. No. 89-719, Tit. I, § 105, 80 Stat. 1138-1139; Act of Nov. 2, 1978, Pub. L. No. 95-585, 92 Stat. 2484; Pub. L. No. 103-355, Tit. IV, § 4104(b)(2), 108 Stat. 3342.

[9] See *Hardaway Co.* v. *United States Army Corps of Eng'rs*, 980 F.2d 1415 (11th Cir.) (no FTCA claim by subcontractor for government's allegedly negligent failure to investigate assets of surety), cert. denied, 510 U.S. 820 (1993); *Westbay Steel, Inc.* v. *United States*, 970 F.2d 648 (9th Cir. 1992) (no FTCA claim for negligent approval of bond sureties and no jurisdiction under FTCA to award an equitable lien); *Arvanis*, 739 F.2d at 1292 (rejecting FTCA claim based on government's failure to require Miller Act bond as attempt "to achieve by indirection a result that [subcontractors] could not reach directly under the Miller Act"); *McMann* v. *Northern Pueblos Enters.*, 594 F.2d 784, 785-786 (10th Cir. 1979) (same); *Devlin Lumber & Supply Corp.* v. *United States*, 488 F.2d 88, 89 (4th Cir. 1973) (per curiam) (same); *United States* v. *Smith*, 324 F.2d 622, 624-625 (5th Cir. 1963) (same).

Tucker Act,[10] or general equitable principles. Thus, in *Automatic Sprinkler Corp. of America* v. *Darla Environmental Specialists*, 53 F.3d 181 (1995), the Seventh Circuit rejected the claim of an unpaid subcontractor, stating:

> The principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief. * * * Automatic Sprinkler has not pointed to such a statute; none exists.

53 F.3d at 182. As a result, "subcontractors must look exclusively to the general contractors (and the bonds) for payment. They cannot obtain liens on the federal projects and buildings, and they cannot collect directly from the Treasury." *Ibid.* ("[W]hen a prime contractor on a federal construction project fails to obtain a Miller Act payment bond and then defaults without paying his subcontractors * * *, the hapless subcontractor, not the United States, is left holding the bag." (internal quotation marks omitted)).

Because the Miller Act does not obligate the Army to pay respondent, respondent's claim does not seek money as "the very thing to which [respondent] was entitled" from the Army. Instead, respondent seeks money from the govern-

[10] See *United Elec. Corp.* v. *United States*, 647 F.2d 1082, 1084 (Ct. Cl.) (subcontractors with no contractual relationship with the government cannot sue under Tucker Act, and Miller Act is not money-mandating statute for Tucker Act purposes), cert. denied, 454 U.S. 863 (1981); see also pp. 47-50, *infra*.

ment to compensate it for the losses it incurred when the Army failed to do what, under respondent's view of the Miller Act, the Army should have done, *i.e.*, required Verdan to post a bond. Because such a "substitute" money remedy is barred as "money damages" under Section 702, see *Bowen*, 487 U.S. at 893, respondent's suit was properly dismissed by the district court.

2. Presumably because the Miller Act does not require the Army to pay respondent, the Ninth Circuit relied on respondent's contract with Verdan as a basis for awarding monetary relief. Respondent's suit is for "specific relief," the Ninth Circuit opined, because it "seeks an equitable lien only for the very thing to which it is entitled under the contract," *i.e.*, a money payment for the work it performed. Pet. App. 7a.[11] But the contract was between respondent and Verdan, not between respondent and the Army; as a result, it entitled respondent to payment from Verdan, not to payment from the Army. See *Merritt* v. *United States*, 267 U.S. 338 (1925) (no claim against United States under contract absent privity between United States and plaintiff). By requiring the government to pay when Verdan did not, the Ninth Circuit provided precisely the sort of "substitute" performance barred as money damages under the APA. See *Bowen*, 487 U.S. at 893. Besides, Section 702 (unlike the Tucker Act) does not refer to contracts as a substantive basis for retroactive money awards against the Treasury, *Richmond*, 496 U.S. at 416 (monetary awards "limited to those authorized by statute"), and the Tucker Act precludes plaintiffs from seeking equitable relief under the APA to enforce contract rights in any event, see pp. 47-48, *infra*.

[11] The Ninth Circuit also found that "[respondent] does not seek any consequential damages to compensate losses suffered beyond the contract price." Pet. App. 7a. Although not mentioned by the majority, respondent also sought interest on the unpaid sums. See Pet. App. 39a, 40a. Presumably, the interest was intended to compensate plaintiff for the lost use of the funds.

3. Finally, the Ninth Circuit relied on "equity." Respondent, the Ninth Circuit asserted, is "entitled" to government funds under the judicially-created doctrine of "equitable liens." According to the Ninth Circuit, once respondent informed the Army that Verdan had not paid respondent, a "lien" (in the amount of respondent's claim) was levied on Army contract funds held in the Treasury. Pet. App. 8a. While that reasoning is questionable even as a matter of equitable lien doctrine,[12] such a judicially-created rule cannot in any event create a money-payment obligation against the United States Treasury; instead, the obligation to pay out public funds can arise only from "the express terms of a specific statute." *Richmond*, 496 U.S. at 432; see pp. 16-23, *supra*. In fact, the Ninth Circuit's "equitable lien" theory cannot be meaningfully distinguished from the "equitable estoppel" theory this Court rejected in *Richmond*.

In *Richmond*, government officials advised Mr. Richmond that he would remain eligible for federal disability benefits despite part-time employment; that advice turned out to be incorrect, and Mr. Richmond lost disability benefits as a result. The Federal Circuit ordered the benefits reinstated, holding that the doctrine of "equitable estoppel" precluded the government from asserting that Mr. Richmond was statutorily ineligible after having caused him to rely on its contrary representations. This Court reversed, holding that substantive payment obligations may not arise from such judicially-crafted equitable doctrines but are instead "limited to those authorized by statute." 496 U.S. at 416; see *id.* at 424, 432.

The "equitable lien" doctrine on which the Ninth Circuit relied is no more valid a basis for the imposition of a money-

[12] It is not enough that the creditor state that it is owed money. Instead, the creditor also must "sufficiently indicate[] an intention to make [the] particular property * * * security for [the] obligation." *Walker* v. *Brown*, 165 U.S. 654, 664-665 (1897) (internal quotation marks omitted). Respondent here did not make that intent clear.

payment obligation on the Treasury than the "equitable estoppel" theory this Court rejected in *Richmond*. To the contrary, if the government's *affirmative false* representations and the claimant's allegedly *justifiable* reliance thereon could not create such an obligation in *Richmond*, then the Army's failure to require Verdan to post a payment bond, and respondent's unjustified failure to inquire into whether Verdan had in fact posted such a bond, cannot create a governmental payment obligation here. As the Fourth Circuit has observed, "[i]t is a fundamental command of the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, that only Congress has the power to define the availability of relief against the government and that 'judicial use of * * * equitable doctrine[s] . . . cannot grant [a claimant] a money remedy that Congress has not authorized.'" *United Servs. Auto. Ass'n* v. *United States*, 105 F.3d 185, 188 (4th Cir. 1997). Because Congress has not by statute recognized an entitlement to funds from the Treasury on the basis of an equitable lien, the Ninth Circuit exceeded the judicial role when it created that entitlement itself. See *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988) ("[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." (quoting *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893)).[13]

[13] The Ninth Circuit's decision also confuses equitable *causes of action* with *equitable remedies*, and ignores the fact that the monetary relief provided in an equitable lien action often is a "substitute" remedy barred as "money damages" under *Bowen* in any event. Here, for example, the equitable lien substitutes payment from the government for the payment from the contractor that respondent never received. Indeed, the substitute nature of the remedy is especially apparent here, because the "very" fund to which the lien allegedly attached—and to which respondent claimed entitlement—no longer exists. Respondent sought an equitable lien on the contract funds held by the Army after Verdan was terminated. Pet. App. 38a-39a. Although respondent's complaint sought an injunction to prevent the Army from dissipating those funds, respondent never sought preliminary relief. As a result, "the Army * * * paid out the monies to which the lien" allegedly "attached." *Id.* at 12a. Even if the exhaustion of funds might not normally "thwart [an] equitable lien claim," *ibid.*, it clearly makes such a claim one for "money damages" within the meaning of Section 702. As the D.C. Circuit explained in *City of Houston* v. *HUD*, 24 F.3d 1421 (1994), once the *specific funds* sought by the plaintiff have been spent, obligated, or otherwise exhausted, an award of money from any other source constitutes a prohibited award of money damages. "Section 702 permits monetary awards only when, as in *Bowen*, such an award constitutes *specific relief*—that is, when a court orders a defendant to pay a sum owed out of a specific *res*. * * * An award of monetary relief from any source of funds [other than the *res* to which the plaintiff claims entitlement] would constitute money damages rather than specific relief, and so would not be authorized by APA section 702." 24 F.3d at 1428. The Ninth Circuit here awarded respondent funds from a source other than the *res* to which the equitable lien allegedly attached.

D. The Ninth Circuit's Imposition of Monetary Liability On The Army Is Inconsistent With The Language And History Of The 1976 Amendment To Section 702

The Ninth Circuit's decision also rests at least in part on a fundamentally mistaken interpretation of Section 702. Departing from the distinction between "substitute" and "specie" remedies this Court drew in *Bowen*, 487 U.S. at 895, the Ninth Circuit read Section 702 as distinguishing between "law" and "equity." In particular, that court appeared to read the 1976 amendment to Section 702 as itself mandating the payment of money—thus rendering the United States substantively liable—in any suit so long as the cause of action or relief sought can be characterized as "equitable" rather than "legal" in nature. Pet. App. 7a-11a; see pp. 7-8, *supra*.

1. As an initial matter, "the line [S]ection 702 draws is not between actions at law and suits in equity." *Hubbard*, 982 F.2d at 539 (Randolph, J., joined by R.B. Ginsburg, J., concurring). Nor is it between "equitable" and "legal" remedies. See *id.* at 537 ("What may qualify as an 'equitable remedy' * * * is not synonymous with specific relief."). Instead, under this Court's decision in *Bowen*, the line Section 702 draws is between suits seeking "money

damages"—monetary relief that compensates a victim for, or substitutes for, a duty that was breached—and suits seeking specific relief, *i.e.*, a remedy that "give[s] the plaintiff the very thing to which he was entitled" from the government in the first instance. *Bowen*, 487 U.S. at 893, 895. Absent a statute imposing a payment obligation on the Treasury, public money is not something to which any plaintiff is entitled.

In any event, the Ninth Circuit was incorrect to assert that "[a]ny equitable rights held by subcontractors as against [federal agencies] which may have been unenforceable where sovereign immunity existed, became enforceable upon immunity being waived," Pet. App. 8a. As this Court has observed, any plaintiff seeking recovery from the United States must show *both* "a waiver of sovereign immunity" and a "source of substantive law" applicable to the United States that "provides an avenue for relief." *Meyer*, 510 U.S. at 484; see also *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 244-245 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (affirming dismissal of action founded on Section 702 because, notwithstanding the waiver of immunity, the substantive source of law relied upon (the Sherman Act) did not apply to the United States). Whether or not immunity has been waived, equitable and common-law doctrines are not by themselves sources of law that can provide a basis for monetary relief against the United States. To the contrary, those sources of law are constitutionally incapable of creating any right to money from the Treasury, except as Congress by statute expressly provides. See pp. 16-23, *supra*.

The 1976 amendment to the APA does not so provide. Section 702 does not by its terms authorize federal courts to create substantive rights to money from the Treasury whenever the rights are equitable. Nor does it track the language of existing liability-creating statutes, see pp. 20-21, *supra*, which could easily have been adapted to such an

end.[14] Instead, the 1976 amendment states only that certain suits seeking "judicial review" of "agency action" shall not be dismissed on the ground that they are "against the United States." 5 U.S.C. 702. That formulation hardly seems calculated to license courts to create any new money-payment obligations against the Treasury, "equitable" or not. To the contrary, it echoes other statutes that permit direct suit against the government in order to allow judicial review of agency action, none of which has ever been construed as creating a substantive right to Treasury funds. See, *e.g.*, 28 U.S.C. 2344 (action seeking judicial review of agency orders "shall be against the United States"). That Congress did not expressly state an intent to create new money-payment obligations in this context "is most eloquent, for such reticence while contemplating an important and controversial"—and potentially costly—"change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). "At the very least, one would expect some hint of a purpose to work such a change * * *." Here, however, "there is none." *Id.* at 267.

In any event, Section 702 is not merely silent. The waiver of immunity added to Section 702 by the 1976 amendment includes the qualification that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. The longstanding rule that only Congress may establish a

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[14] Thus, if Congress had intended courts to create new money-payment rights in "equity" as a matter of federal common law, it could have echoed the language of the FTCA, declaring that "[t]he United States shall be liable to [equitable] claims"—or claims seeking equitable relief—"in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674; or borrowed from the Tucker Act, giving federal courts jurisdiction over monetary claims "founded upon [equity]," 28 U.S.C. 1491; or followed the model of the sue-and-be-sued clause, stating that federal agencies can "sue and be sued" with respect to all "equitable actions" or "equitable relief." Yet it did none of these things.

right to public funds held by the Treasury—and must do so through the express terms of a money-mandating statute—is precisely such a "limitation[] on judicial review" and a "legal * * * ground" for "dismissing [the] action or deny[ing] [monetary] relief." See Report of the Committee on Judicial Review in Support of Recommendation No. 9, in 1 *Recommendations and Reports of the Administrative Conference of the United States* 226 (Jan. 8, 1968-June 30, 1970) (*Administrative Conference Report*) (even "[w]here Congress has not expressly or impliedly precluded specific relief, injunctive relief nevertheless will be denied" if other principles so require); *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 136 (1970) (*1970 Sovereign Immunity Hearing*) (same). Indeed, as then-Judge Ginsburg pointed out in *Sea-Land*, 659 F.2d at 245, the fact that the substantive law relied upon "does not expose United States instrumentalities to liability, whether equitable or legal in character," is undeniably "such a ground" for dismissal.

For that reason, the Ninth Circuit's observation that neither *Bowen* nor the APA expressly requires "that the specific relief requested be statutorily granted," Pet. App. 8a, and the Second Circuit's similar assertion in *Aetna*, 71 F.3d at 479, are wide of the mark. The decision in *Bowen* had no reason to address whether Section 702 licenses courts to create money-payment mandates based on "equity," because that question was not before it; the money-payment mandate asserted in that case was statutory in nature. Nor does it matter that Section 702 does not explicitly mention the rule that payment obligations against the Treasury arise only as Congress by law directs. That rule is mandated by the Appropriations Clause of the Constitution, and Section 702 does not itself create an entitlement to public money. In any event, the terms of statutes waiving sovereign immunity "must be construed strictly in favor of the sovereign."

Nordic Village, 503 U.S. at 34 (internal quotation marks omitted); see *Sherwood*, 312 U.S. at 590. By interpreting Section 702 as licensing courts to create new money-payment obligations that Congress itself has not by statute recognized, the Ninth Circuit ignored those bedrock principles.

2. The legislative history of the 1976 amendment confirms that Congress had no intent to license the judiciary to create or impose new common-law or equitable rights to funds in the Treasury. The Senate Report, under the heading of "Cost," makes this clear. It notes:

> The committee does not believe that enactment of [the proposed waiver of immunity in Section 702], which is procedural in nature and clarifies the jurisdiction of Federal courts while marginally expanding it, will require additional appropriation of funds to either the judiciary or the agencies.

S. Rep. No. 996, 94th Cong., 2d Sess. 19 (1976). That language cannot be squared with the Ninth Circuit's construction of Section 702. If Congress in fact had intended to open the Treasury to new substantive bases for monetary awards whenever the cause of action or relief is considered "equitable," the assertions that the amendment is "procedural in nature" and that "additional appropriation[s] of funds" are not necessary would both be wrong.

Nor can the Ninth Circuit's interpretation of the 1976 amendment be reconciled with the representations of its drafter, the Administrative Conference of the United States. Nowhere did the representatives of that body suggest that the amendment would give rise to new "equitable" rights to funds in the Treasury, or create new money-payment obligations where before there were none. To the contrary, the representatives of that body repeatedly assured Congress that "[t]he monetary liability of the United States is left totally unchanged." *1970 Sovereign Immunity Hearing*,

supra, at 50 (comments of Prof. Cramton); see also *id.* at 14 (legislation "carefully drawn to avoid exposing the Government to increased monetary liability") (comments of Ashley Sellers, Chairman of the Judicial Review Committee of the Administrative Conference).[15] Indeed, the Administrative Conference represented that, in contrast to a sue-and-be-sued clause, the waiver of immunity in Section 702 would not "affect the longstanding immunity of the United States from garnishment process," because (among other things) such actions are barred as seeking "monetary relief." *Administrative Conference Report*, *supra*, at 224 (citing *FHA* v. *Burr*, 309 U.S. 242 (1940)); *1970 Sovereign Immunity Hearing*, *supra*, at 134 (same). That representation is contrary to the Ninth Circuit's reading of Section 702. Under the Ninth Circuit's approach, such a garnishment or attachment action would be permitted to proceed, so long as it is "equitable" in nature. See also pp. 45-46, *infra*.

E. Federal Common Law Does Not Give Rise To Either A Substantive Right To Money From The Treasury Or A Cause Of Action To Enforce It

The Ninth Circuit also erred to the extent it purported to find a substantive right to public funds in this Court's cases. For decades "nothing [has been] more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation," and "cannot acquire a lien on public buildings" or government funds. *Munsey Trust*, 332 U.S. at 241; see *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910) (government property "intended for * * * public use" cannot be "seized or encumbered under state lien laws" so as "to answer the claims of a private person"); *Equitable Sur.*

[15] See also *id.* at 238 ("[T]he liability of the United States in damages is totally unaffected.") (Prof. Cramton); *id.* at 2 ("The bill does not apply to monetary damages and will not open the United States to any further liability for such damages.") (Sen. Kennedy).

Co. v. *McMillan*, 234 U.S. 448, 455 (1914) (liens otherwise permissible on private property are not "permissible in the case of a Government work"); *J.W. Bateson Co.* v. *United States*, 434 U.S. 586, 589 (1978) (liens "cannot attach to Government property" (internal quotation marks omitted)); *F.D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 122 (1974) (because "a lien cannot attach to Government property, * * * suppliers on Government projects are deprived of their usual security interest").

1. The decisions of this Court upon which the Ninth Circuit and respondent rely for the contrary proposition, *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132 (1962); *Prairie State Bank* v. *United States*, 164 U.S. 227 (1896); and *Henningsen* v. *United States Fidelity & Guar. Co.*, 208 U.S. 404 (1908), do not support that view. None of those cases purported to overrule *Munsey* and its predecessors. Nor did any of them abrogate the Appropriations Clause by constructing payment obligations against the Treasury from common law or equity alone. In fact, none of the cases even involved a claim *against the government*. Instead, they all involved contests between private parties over funds as to which the United States had disclaimed any ownership, and had transferred out of the Treasury.

In *Prairie State Bank*, for example, this Court was asked to determine which of two non-government parties, a bank or a surety, had a superior right to certain funds. See 164 U.S. at 227 ("The real contestants in the controversy below were the Prairie State National Bank and Charles A. Hitchcock * * *."). The government had disclaimed any interest in the funds, and had placed them into the registry of the Court of Claims by way of interpleader. See *id.* at 228 (The "Secretary of the Treasury [had] transmitted the [funds] to the Court of Claims under § 1063, Rev. Stat.").[16]

[16] As Judge Nott of the Court of Claims explained, *Prairie State Bank* "involve[d] no question of liability on the part of the Government [and

In the course of resolving the dispute between the bank and the surety, the Court in *Prairie State Bank* did apply an equitable doctrine (subrogation) to determine that the surety had a superior claim to the funds. *Id.* at 231-240. But the decision nowhere held that common law or equity can give a private party a right to public funds in the Treasury *vis-à-vis* the government itself. To the contrary, at the same time it concluded that the bank's claim was inferior to the surety's, the Court carefully cabined its holding, declaring that the bank's rights "were subordinate to those of the United States and of the sureties." *Id.* at 240; see *Pearlman*, 371 U.S. at 143 (Clark, J., concurring) ("In neither [*Prairie State Bank* nor *Henningsen*] did the Court find that laborers and materialmen had any right against the United States.").

Nor does *Pearlman* or *Henningsen* support the Ninth Circuit's view. Those cases, like *Prairie State Bank*, involved contests among non-governmental parties—banks, contractors, and sureties.[17] In neither case did the United States have an interest in the funds, since it had voluntarily relinquished them to one of the parties, and in neither case

instead] relate[d] simply to the distribution of the fund * * * the Government * * * brought into court by bill of interpleader." *Hitchcock* v. *United States*, 27 Ct. Cl. 185, 211 (1892) (Nott, J. dissenting). The majority agreed. *Id.* at 201 ("[C]laimants * * * Prairie State National Bank and Charles A. Hitchcock * * * seek to recover the amount admitted by [the United States] to be due to one or the other.").

[17] In *Pearlman*, the dispute was between a contractor in bankruptcy and the surety that had paid the contractor's debts when it defaulted. 371 U.S. at 133 ("This is a dispute between the trustee in bankruptcy of a government contractor and the contractor's payment bond surety over which has the superior right and title to a fund * * *."). In *Henningsen*, the dispute was between a surety that had guaranteed payment by a defaulting federal contractor, and a bank that had loaned the contractor money. See 208 U.S. at 410 (question presented is whether "the equity" of the surety is "superior to that of one who simply loaned money to the contractor to be by him used as he saw fit").

was the government a party.[18] Thus, even though *Pearlman* and *Henningsen*, like *Prairie State Bank*, resolved disputes among private parties through equitable principles, neither case held that claimants have substantive "equitable rights" to government funds as against the government itself.[19]

For that reason, the Court of Claims rejected the contention that *Pearlman*, *Prairie State Bank*, and *Henningsen* give subcontractors rights to government funds. As it explained:

> [I]n all the cases touching on this issue the rights of the various parties have been defined in situations in which the issue is one of priority between competing [private] interests in the fund * * *. None have involved a plaintiff-subcontractor directly asserting a claim to money held by the Government. The subcontractors do possess equitable rights to the retained funds vis-à-vis other claimants to the money, but their rights * * * do not necessarily include or imply a right in the subcontractor itself to sue the Government.

[18] In *Pearlman*, "the fund was turned over to the bankrupt's trustee." 371 U.S. at 134. In *Henningsen*, the government—by agreement of the parties—paid the money over to the bank claimant, "with a stipulation that if it should be finally determined that the Guaranty Company was entitled to receive it then the bank should pay it to the Guaranty Company." 208 U.S. at 405.

[19] The Ninth Circuit's reliance on cases involving the Postal Service's sue-and-be-sued clause, 39 U.S.C. 401(1), is likewise misplaced. See Pet. App. 8a (citing *Wright* v. *United States Postal Serv.*, 29 F.3d 1426 (9th Cir. 1994); *Kennedy Elec. Co.* v. *United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974); *Active Fire Sprinkler Corp.* v. *United States Postal Serv.*, 811 F.2d 747 (2d Cir. 1987)). As discussed above, the sue-and-be-sued clause there evinced Congress's intent to "launch[] [the Postal Service] into the commercial world," making its amenability to suit and "liability" largely "the same as that of any other business." See p. 21, *supra* (quoting *Franchise Tax Board*, 467 U.S. at 520); see also note 6, *supra*. Section 702 has no such purpose.

United States Fidelity & Guar. Co. v. *United States*, 475 F.2d 1377, 1382 (1973); accord, *United Elec. Corp.* v. *United States*, 647 F.2d 1082, 1086 (Ct. Cl.), cert. denied, 454 U.S. 863 (1981). The same reasoning applies here.[20]

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[20] Nor can the Ninth Circuit's decision be supported by the subrogation decisions of the Federal Circuit, the Court of Federal Claims, or their predecessors. See Br. in Opp. at 16 n.18. Those decisions nowhere hold that "equitable rights" to Treasury funds may be asserted in the absence of statutory authorization. Instead, they assert (mistakenly) that the Tucker Act recognizes subrogation as a money-mandating cause of action. According to those courts, subrogation permits a surety that cures a contractor's default to stand in the shoes of and to assert all the rights of the contractor, perhaps including the contractor's privity of contract with the United States and thus the right to sue the United States on contract under the Tucker Act. See *United States Fidelity & Guar. Co.*, 475 F.2d at 1382 ("[T]he surety was entitled to the benefit of *all* the rights * * * of the contractor whose debts it paid. The surety then is subrogated to the rights of the contractor who could sue the Government since it was in privity of contract with the United States."). That reasoning is inapplicable to subcontractors, which have no such relationship with the government. *Balboa Ins. Co.* v. *United States*, 775 F.2d 1158, 1161 (Fed. Cir. 1985) ("In contrast to a subcontractor, which has no obligations running directly to or from the Government, a surety, as bondholder, is as much a party to the Government contract as the contractor.").

Besides, the reasoning of those decisions is incorrect. A subrogation claim cannot be characterized as a "contract" claim under the Tucker Act. "The right of subrogation is not founded on contract. It is a creature of equity; [it] is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Pearlman*, 371 U.S. at 136 n.12 (internal quotation marks omitted). Moreover, those decisions effectively set the doctrine of subrogation on its head. A surety is not subrogated to the rights of the defaulting party; it is subrogated to and "entitled to all the rights of the person [it] paid." *Pearlman*, 371 U.S. at 137 (footnote omitted). Thus, the surety does not step into the shoes of the contractor with respect to its rights against the United States. It steps into the shoes of the United States with respect to the government's rights against the contractor. The one exception is where the surety, rather than paying a defaulting contractor's debt to the United States, enters into a takeover agreement with the government. In such a case, the surety, by express agreement with the government, is substituted for the contractor and enters into privity of contract with the United States. In that event, a predicate for Tucker Act jurisdiction—an express contract—is readily apparent. See *Ransom* v. *United States*, 17 Cl. Ct. 263, 267 (1989) ("[I]t is well established that a surety who takes over a project for a defaulted contractor can seek to recover its cost from the remaining contract funds."), aff'd, 900 F.2d 242 (Fed. Cir. 1990).

2. Even if we assume, *arguendo*, that this Court could recognize a substantive right to obtain funds from the federal Treasury through an equitable lien, there is no reason for it to do so. At the very least, the Appropriations Clause and separation of powers principles counsel restraint. That restraint is especially warranted in light of the absence of any evidence that Congress intended the 1976 amendment to the APA to become a license for the creation of new rights to obtain money from the federal Treasury. See pp. 20-23, 31-36, *supra*.

Further, the "special factors" that "counsel[] hesitation" with respect to the creation of constitutional causes of action, *Meyer*, 510 U.S. at 486 (internal quotation marks omitted), counsel hesitation here. Congress has legislatively addressed the protection of subcontractors through the Miller Act, and courts should not second-guess that legislative judgment by filling perceived statutory gaps with purported common-law or equitable rights. Moreover, establishing such enforceable rights "would * * * creat[e] a potentially enormous financial burden for the Federal Government." *Ibid.* The better course is to "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Ibid.*

II. THE WAIVER OF IMMUNITY IN SECTION 702 DOES NOT APPLY BECAUSE EQUITABLE LIEN CLAIMS ARE NOT SUITS FOR "JUDICIAL REVIEW" OF "AGENCY ACTION" WITHIN THE MEANING OF SECTION 702

A. To sue the United States, a plaintiff must show not only that there has been a waiver of immunity, but also that the waiver extends to the cause of action asserted. Cf. *Lane*

v. *Peña*, 518 U.S. 187, 197 (1996) ("[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived."). The 1976 amendment to the APA does not waive the United States' immunity to actions for "equitable liens" or any other similar cause of action. Instead, the waiver is limited to the traditional forms of action that seek "judicial review" of "agency action."

That conclusion flows from the structure of Section 702 itself. When Congress partially waived the government's immunity in 1976, it did not do so by enacting an entirely new provision of the United States Code. Instead, it inserted a waiver of immunity into the APA, and into Section 702 in particular. By so doing, Congress ensured that the waiver would be confined to the causes of action that Section 702 itself recognizes and codifies—namely the suits through which a "person suffering legal wrong" or "adversely affected or aggrieved" because of "agency action" has traditionally obtained "judicial review thereof," 5 U.S.C. 702 (1970). See *Gade* v. *National Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 97 (1992) (statutory construction must account for the "structure" of the statute); *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 645 (1990) (Court must "giv[e] effect to the meaning and placement of the words chosen by Congress.").

That Congress intended to limit Section 702's waiver of immunity in that fashion could not be clearer. The House Report declared that, by placing the waiver of immunity in Section 702, Congress intended to limit its scope.[21] The Department of Justice, speaking through then Assistant Attorney General Scalia, conditioned its support for the 1976

[21] See H. Rep. No. 1656, 94th Cong., 2d Sess. at 11 (1976) ("Since the Amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701.").

amendment on a similar understanding.[22] And the authors of the amendment so understood it as well. "Because the amendment is to be added to 5 U.S.C. § 702 (a provision of the Administrative Procedure Act entitled right of review)," the Chairman of the ABA's Administrative Law Section explained, "it will be applicable only when that provision is applicable." *1970 Sovereign Immunity Hearing*, *supra*, at 59 (statement of Dan M. Byrd, Jr.). Professor Kenneth Culp Davis echoed that view: "Because the amendment is to be added to 5 U.S.C. §§ 702 and 703 * * * it will be applicable only when those provisions are applicable." *Id.* at 222; see also *id.* at 238 ("The proposal is an amendment to the Administrative Procedure Act and that has several important consequences. First, it is applicable only to agencies. It is applicable only to administrative conduct and conduct of the individual that is contemplated for judicial review by the APA * * *.") (Prof. Cramton).

Here, neither the Ninth Circuit nor respondent attempted to explain how assertion of an "equitable lien" claim is a suit for "judicial review." Nor did they identify the "agency action" being subjected to that "review." Those omissions cannot be reconciled with the requirements of Section 702. As this Court has explained, any plaintiff "claiming a right to sue [under Section 702] must identify some 'agency action' that affects him in the specified fashion"; and "it is judicial review 'thereof' to which he is entitled." *Lujan* v. *Defenders of Wildlife*, 497 U.S. 871, 882 (1990).[23]

[22] *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 105 (1976) ("[I]t is also an important factor in our support for the bill that the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act * * * .").

[23] It is possible that the Ninth Circuit believed that the waiver of immunity in Section 702 is free floating and extends beyond suits for "judicial review" of "agency action." See *Presbyterian Church* v. *United*

B. Neither a suit for an equitable lien, nor any other cause of action typically litigated between private parties, qualifies as an action for "judicial review." To the contrary, that phrase is by definition reserved for the forms of action traditionally used to challenge governmental conduct. See *Black's Law Dictionary* 762 (5th ed. 1979) (defining "Judicial review" as a "[f]orm of appeal from an administrative body to the courts for review of either the findings of fact, or of law, or both"); *Committee of Blind Vendors* v. *District of Columbia*, 28 F.3d 130, 134 (D.C. Cir. 1994) (APA does not apply to "common-law causes of action" because it affords review of "agency action," and "no agency proceeding took place for the court to review").[24]

States, 870 F.2d 518, 525 (9th Cir. 1989) ("[T]he 1976 amendment to § 702 waives sovereign immunity in all actions seeking relief from official misconduct except for money damages" and is not limited to "actions challenging 'agency action' as technically defined in § 551(13)."). Any such holding, however, would be inconsistent with the text and history of the waiver of immunity in Section 702, and with this Court's decision in *Lujan*, 497 U.S. at 882.

[24] The remaining language of Section 702 leaves little doubt that it permits only those forms of judicial review that preceded its enactment. Before Section 702 was enacted in 1946, judicial review was obtained through statutory judicial review, which is captured by the APA's phrase "adversely affected or aggrieved within the meaning of a relevant statute," see, *e.g.*, *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 472, 476 (1940), and so-called non-statutory judicial review in the form of suit against a government officer alleging *ultra-vires* conduct, which is captured by the phrase "suffering legal injury," see, *e.g.*, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940). Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 394-395 (1970); W. Gellhorn & C. Byse, *Administrative Law* 113-114 (1970); *Attorney General's Manual on the Administrative Procedure Act* 96 (photo. reprint 1979) (1947). Indeed, 5 U.S.C. 703 clearly specifies that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter * * * or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. 703. As the Attorney General's nearly contemporaneous manual explains, "[i]n

That was also the understanding of the drafters of the 1976 amendment, who expected non-"review" tort and other such actions to be excluded from Section 702's waiver of immunity. As the Administrative Conference twice explained, "the purpose of the Committee's recommendation is to provide nonstatutory review in some situations in which the doctrine of sovereign immunity now stands in the way. The creation of new substantive damage claims is not within the sphere of our concern; only a latitudinarian view of 'judicial review' would consider monetary relief against the United States, primarily designed to compensate for harms done, as part of judicial review of administrative action, which is the subject of § 10 of the APA." *1970 Sovereign Immunity Hearing*, *supra*, at 139; *Administrative Conference Report*, *supra*, at 229.

It also was for that reason that the drafters of the 1976 amendment understood that actions for garnishment or attachment, even if equitable, would continue to be barred. Such suits not only seek "monetary relief," but also do "not involve a claim that 'an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority'" within the meaning of Section 702. *1970 Sovereign Immunity Hearing*, *supra*, at 134; *Administrative Conference Report*, *supra*, at 224. Precisely the same is true with respect to actions for an "equitable lien."

C. The Ninth Circuit erred not only by failing to examine whether a common-law "equitable lien" action is a claim for "judicial review," but also by failing to identify the "agency action" being subjected to review. See *Lujan*, 497 U.S. at 882. Once one identifies that "action"—even assuming *arguendo* that it constitutes "agency action" under 5 U.S.C.

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the absence of any special statutory review proceedings, other forms of action, as heretofore found by the courts to be appropriate in particular situations, will be used." *Attorney General's Manual*, *supra*, at 97.

551(13), see *Lujan*, 497 U.S. at 882—it becomes readily apparent that respondent's suit seeks money damages.

Shorn of the "equitable lien" label, respondent's lawsuit seeks relief based on the Army's "action" of failing to require Verdan to post a Miller Act bond. But if the Army's failure to require a bond is the "agency action" subject to review, money from the Treasury cannot be "specific relief," as it does not give respondent "the very thing to which" respondent "was entitled," *i.e.*, Army action to ensure that a bond from a qualified surety is posted. See pp. 24-25, *supra*. Nor can respondent prevail by characterizing this suit as a challenge to the Army's "action" of refusing to pay respondent when Verdan did not, since the Army had no obligation (or authority) to pay respondent money from the Treasury in the absence of a specific statute so providing. See pp. 16-23, *supra*.

Moreover, even if an obligation to pay could arise from a judicial decision under an "equitable lien" doctrine or otherwise, respondent's suit still falls outside Section 702's waiver of immunity. A fundamental premise of respondent's action (and the Ninth Circuit's decision) is that an "equitable lien" was levied on government funds as soon as respondent advised the Army of Verdan's failure to pay. Even if foreclosure on that lien could be "specific relief" permitted by Section 702, respondent cannot identify the waiver of immunity that allowed the placement of a lien on federal funds in the first place. Placing a lien on public funds is not "judicial review"; and it does not pass upon or review "agency action." Since no waiver of immunity permitted a lien to attach to government funds, there was no right to the funds that could be specifically enforced.

III. THE RELIEF RESPONDENT SEEKS IS IMPLIEDLY FORBIDDEN BY OTHER STATUTES

Respondent's suit is also barred by the final sentence of Section 702, which declares that nothing in that provision "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702; see, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 286 n.22 (1983). The "impliedly forbids" language extends to "all statutes which grant consent to suit and prescribe particular remedies." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13 (1976). As then Assistant Attorney General Scalia explained to Congress in 1976:

> Because existing statutes have been enacted against the backdrop of sovereign immunity, [Section 702's exclusion of relief where another statute 'impliedly forbids' it] will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief.

Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 105 (1976). In other words, the "impliedly forbids" language bars the assertion of an APA claim for "specific relief" whenever Congress has provided the claimant with a remedy in another statute, but chosen to withhold the particular relief the claimant seeks.

The Tucker Act, 28 U.S.C. 1346(a)(2), 1491, provides for money damages awards in suits based on "express or implied contract," but largely bars "equitable relief." See *Testan*, 424 U.S. at 397-398; *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575-577 (1867); *Bonner* v. *United States*, 76 U.S. (9 Wall.) 156, 159 (1869); *United States* v. *Jones*, 131 U.S. 1, 9,

14-18 (1888); see 28 U.S.C. 1491(a)(3). Because Congress in the Tucker Act chose to withhold equitable relief in contract actions, the courts of appeals unanimously agree that a plaintiff cannot obtain "specific performance" or other equitable relief on a contract under the APA.[25] Consistent with the legislative history of the 1976 amendment, they have held that such relief is "impliedly forbid[den]" within the meaning of Section 702.[26] If the prime contractor, which is in

[25] See, *e.g.*, *North Star Alaska* v. *United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc) (per curiam) (APA does not afford district courts jurisdiction over equitable claims against the government based on contract rights, as opposed to statutory rights), on remand to panel, 14 F.3d 36 (9th Cir.), cert. denied, 512 U.S. 1220 (1994); *Zelman* v. *Gregg*, 16 F.3d 445, 448 (1st Cir. 1994) ("equitable relief cannot be obtained on contract claims against the government"); *Eagle-Picher Indus.* v. *United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (APA's waiver of sovereign immunity "does not extend to actions founded upon a contract with the United States"); *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990) (effort to obtain specific performance of promise allegedly made by an agency not within district court's jurisdiction); *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.) ("The sole remedy for an alleged breach of contract by the federal government is a claim for money damages."). In *Bowen*, this Court noted that equitable actions for monetary relief under a contract have frequently been described as seeking specific relief. 487 U.S. at 895 (quoting *Maryland Dep't of Human Resources*, 763 F.2d at 1446). The only contract suits cited in the quoted discussion, however, were between private parties, and the discussion did not suggest that such a claim for specific performance of a contract could be brought against a federal agency under the APA. *Bowen* itself, after all, involved a statutory claim, not a contract claim, and it did not discuss the "impliedly forbids" proviso in Section 702.

[26] See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 11 (1976) ("limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes are unaffected"); *1970 Sovereign Immunity Hearing*, *supra*, at 3 ("[I]f the Government breaches a contract, the aggrieved party cannot under this bill bring an injunction for specific performance against the United States; he is limited by law to monetary damages under the Tucker Act.") (Sen. Kennedy); *id.* at 50 ("You cannot get specific performance of a Government contract; injunctive and declaratory relief are unavailable. * * * The bill makes it entirely clear that this situation is not affected in the slightest. * * * [T]he Tucker Act is in fact

privity with the government, cannot enforce its right to payment by seeking "specific performance" under the APA, it should follow *a fortiori* that a subcontractor, which is not in privity, cannot do so either.

In addition, while the Tucker Act permits actions based on express or implied-in-fact contracts, it long has been held to bar relief based on implied-in-law contracts and unjust enrichment theories. See *Hercules, Inc.* v. *United States*, 516 U.S. 417, 423 (1996) (Tucker Act waives immunity for claims based on "contracts either express or implied in fact, and not [for] claims on contracts implied in law"); *Mitchell*, 463 U.S. at 218; *United States* v. *Minnesota Mut. Invest. Co.*, 271 U.S. 212, 217 (1926); *Sutton* v. *United States*, 256 U.S. 575, 581 (1921). Equitable lien claims like respondent's, which are not based on the terms of a contract with the government, are subject to this prohibition as well, since they, like other implied-in-law obligations, "proceed from a perception that a party *ought* to be bound rather than from a conclusion that a party has *agreed* to be bound." *Aetna Cas. & Sur. Co.* v. *United States*, 655 F.2d 1047, 1059 (Ct. Cl. 1981). Because monetary relief on such claims is barred by the Tucker Act, see *id.* at 1059-1060; *United Elec. Corp.*, 647 F.2d at 1084 & n.5 (equitable lien); see also *Fincke* v. *United States*, 675 F.2d 289, 296-297 (Ct. Cl. 1982) (quantum meruit), courts are "impliedly forbid[den]" from affording that relief under the APA.[27]

an act consenting to suit which impliedly forbids injunctive and declaratory relief.") (Prof. Cramton); *id.* at 238 ("There is no specific performance of a contract in our federal jurisprudence, and we do not create it with this proposal.") (Prof. Cramton).

[27] To the extent the Tucker Act does not bar relief, the Miller Act does. The Miller Act, like the Tucker Act, was enacted "against the backdrop of sovereign immunity." See pp. 25-26, *supra* (Congress's motivation was to mitigate harsh consequences of the rule that subcontractors cannot enforce liens on public property). And it "consent[s]" to suit in the name of the United States on payment bonds, while excluding the recovery of money from the United States. See 40 U.S.C. 270b(a), (b); p. 26, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
BARBARA C. BIDDLE
MARY K. DOYLE
Attorneys

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Consequently, the attempt to create an alternative monetary remedy against the government through the APA is "impliedly forbid[den]" within the meaning of Section 702. Indeed, it is precisely to prevent such an effort to "subvert the Miller Act," and effect a "direct raid on the [T]reasury," that the "impliedly forbids" language was inserted into Section 702. Cf. *Hardaway Co.* v. *Army Corp. of Eng'rs*, 980 F.2d 1415, 1416-1418 (11th Cir.), cert. denied, 510 U.S. 820 (1993); see also pp. 26-27 & nn. 9-10, *supra* (citing additional cases).

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, provides:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2. Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. 702, provides:

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny

relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

3. Section 10(b) of the Administrative Procedure Act, as amended, 5 U.S.C. 703, provides:

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

4. The Miller Act, 40 U.S.C. 270a-270d, provides in pertinent part:

§ 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the con-

tract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

* * * * *

§ 270b. Rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d-1 of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on

which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was

performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

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97
No. 98-1642

In The

Supreme Court of the United States

October Term, 1998

THE UNITED STATES DEPARTMENT OF THE ARMY,

Petitioner,

vs.

BLUE FOX, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

THOMAS F. SPAULDING
Counsel of Record
DAVID A. WEBSTER
SPAULDING, COX & SCHAEFFER, LLP
Attorneys for Respondent
1205 N.W. 25th Avenue
Portland, Oregon 97210-2497
(503) 222-3815

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53 pp

QUESTION PRESENTED

Is a subcontractor's suit to enforce an equitable lien against the United States a suit for "money damages" within the meaning of the Administrative Procedure Act, 5. U.S.C. § 702, and this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

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STATEMENT

In September, 1993, pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), the United States Department of the Army awarded a contract to the United States Small Business Administration. Pet. App. 2a. The contract involved the installation and testing of a telephone switching system and the construction of a facility to house the switching system at the Umatilla Army Depot, Oregon. *Id.* SBA agreed to furnish the supplies and services requested by the Army by subcontracting with Verdan Technology, Inc. *Id.*

Verdan subcontracted the construction portion of its contract to Respondent Blue Fox. Pet. App. 4a. The total cost of the work to be performed by Blue Fox was $186,347.80. *Id.* Blue Fox did not know until it had completed its performance under the contract that Verdan had not furnished a payment bond. *Id.* Verdan failed to pay Blue Fox its full contract price -- the sum of $46,586.14 remained due. *Id.* Blue Fox informed the Army and SBA in writing on May 26, 1994, and again on June 15, 1994, that it had not been fully paid. *Id.* In its June 15, 1994 letter to the Army, Respondent requested "suspension or reduction of payment be administered by your agency." J.A. 33.[1] Nevertheless, the Army subsequently disbursed a total of $86,132.33 to Verdan between July and October, 1994. *Id.*

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[1]The Progress Payments clause of the Verdan contract permitted the Contracting Officer to "reduce or suspend progress payments" after finding on substantial evidence that any of several performance deficiencies had occurred, including "delinquen[cy] in payment of the costs of performing this contract in the ordinary course of business." Clause I.74 52.232-0016 I, page I-16, Exhibits to Plaintiff's Motion for Summary Judgment, Tab A, p. 96.

On January 3, 1995, the Army terminated Verdan's contract for default. Pet. App. 5a. In its notice of intention to terminate the contract, the Army indicated that one of its "most severe items of concern" was Verdan's failure to pay Blue Fox. *Id.* After termination of the Verdan contract, the Army chose Dynamic Concepts, Inc. to finish the uncompleted portion of the work, under an existing contract between the Army and Dynamic. The modification contract with Dynamic was for $126,772.78 and was partially funded with the undisbursed balance on the Verdan contract, $84,910.52. *Id.* The Army did not authorize payment to Dynamic for its work in completing the project until July 27, 1995, two months after Blue Fox filed suit in district court, asking *inter alia*, that the court enjoin the Army and SBA from paying any further monies or making any payments from funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project, until Blue Fox's unpaid bill is satisfied. *Id.*

The original solicitation issued by the Army required the contractor to furnish payment and performance bonds if the contract exceeded $25,000. Pet. App. 3a.; Choate Aff. par. 6 (J.A. 59); Sawyer Aff. par. 6 (J.A. 63). On July 22, 1993, the Army's Contracting Specialist, Elizabeth Faler, spoke with the Army Judge Advocate General's Office, in regard to the bond requirement on the project. According to Ms. Faler's Memorandum of the conversation, she was told that "only VERDAN could get the bonds and that we did not have a contract with VERDAN's subs. She was very adamant about the subject." The following day, Ms. Faler spoke with SBA's Ms. Witty. Ms. Faler wrote that "I related what the Department of the Army Judge Advocate's Office had said. She [Ms. Witty] completely disagreed with their recommendations." Among other reasons given to Ms. Faler, Ms. Witty felt that Verdan would not qualify for a bond "because of its lack of experience in construction." J.A. 45

Ms. Witty recommended that the Army remove the Bond requirement...." J.A. 46. On August 5, 1993, the Army amended the solicitation, deleting the bond requirements. Sawyer Aff. par. 6 (J.A. 63).

Under 13 CFR § 124.305 (1990), the SBA was empowered to exempt an 8(a) participant from Miller Act bonding requirements where SBA determines that the 8(a) concern is unable to obtain the requisite bonds. To protect subcontractors, these regulations required, *inter alia*, that disbursement of contract proceeds be made through a special bank account, so that payment can be made directly to subcontractors, 13 CFR § 124.305(d)(2), and that the 8(a) concern provide written notification to subcontractors informing them that the primary contractor is not furnishing a Miller Act bond. 13 CFR § 124.305(d)(4). Nothing in the record evidences compliance with these regulations in connection with deleting the Miller Act bond requirements. Blue Fox never received the notice required by 13 CFR § 124.305. Lumly Aff. par. 12 (J.A.26). In its opinion, the Ninth Circuit emphasized "SBA's conscious avoidance of the Miller Act requirements" in the form of notes of telephone conversations within the SBA," and "between officers of the SBA and the Army...." Pet. App. 13a, n.6.

When Plaintiff asked the Army, in an Interrogatory, to explain why no bond was furnished, the Army answered as follows:

> **ANSWER:** The reason is not clear from the record. It may have been because the contract was classified under Standard Industrial Classification (SIC) Code 4813, telephone communications, and that government personnel did not require the payment bond because the primary SIC code was determined to be 4813, a non-construction SIC code. It may also have been because the government believed it could waive the

Miller Act requirements.

Excerpts of Record at 29-30, *Blue Fox, Inc. v. SBA*, 121 F.3d 1357 (1997) (No. 96-35648).

In dismissing the case, the district court concluded, *sua sponte*, that the Miller Act did not apply to the Verdan contract. Pet. App. 29a. In its brief however, the government conceded before the district court that the Miller Act was applicable. ("The Army and the SBA conceded before the district court that the contract at issue was subject to the Miller Act. The Defendants again concede that the Verdan contract was subject to the Miller Act."). Appellee's Opening Brief, at 11. The Ninth Circuit agreed that the Miller Act applied to the Verdan contract. Pet. App. 3a.

SUMMARY OF THE ARGUMENT

The equitable rights of unpaid subcontractors to construction balances are long-recognized in this Court's decisions. Ninety years ago, in *Henningsen v. United States Fidelity & Guar. Co.*, 208 U.S. 404, 410 (1908), this Court stated that the government had "equitable obligations to see that the laborers and supplymen were paid." This Court reaffirmed that recognition in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 141 (1962), stating that "laborers and materialmen had a right to be paid out of the fund...."

In this suit, Respondent Blue Fox, Inc., an unpaid federal subcontractor, seeks to declare and enforce such equitable rights. For years, the federal courts have permitted sureties on government contracts to enforce related rights. Thus, in *Pearlman*, this Court upheld a surety's right to reimbursement from remaining contract monies, reasoning that the surety, having paid the laborers and materialmen, was entitled to the benefit of the rights of the persons it paid. *Id.* at 141. If the surety's right to reimbursement rests on the rights of the subcontractors it paid, it stands to reason that the subcontractors themselves should be able to assert those rights where there is no surety.

Nevertheless, unpaid subcontractors traditionally have been unable to sue the government directly. Although sympathetic to their plight, courts were helpless to act, because of the bar of sovereign immunity. Absent sovereign immunity, however, the obstacle to enforcement no longer exists. Thus, when sovereign immunity is waived, unpaid subcontractors can directly enforce equitable rights to remaining contract monies. Applying this rationale, at least three circuit courts of appeal have permitted unpaid subcontractors to bring equitable lien actions against an agency of the government whose immunity Congress waived.

See *Active Fire Sprinkler Corp. v. United States Postal Serv.*, 811 F.2d 747, 756 (2d Cir. 1987); *Kennedy Electric Co., Inc. v. United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974); *Wright v. United States Postal Serv.*, 29 F.3d 1426 (9th Cir. 1994).

The Administrative Procedure Act waives sovereign immunity over Respondent's claim here. In 1976, Congress amended the APA to add what this Court has described as "an important part of a major piece of legislation...." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988). In that amendment, Congress "eliminate[d] the sovereign immunity defense in all equitable actions for specific relief against a Federal agency. . . ." *Bowen*, 487 U.S. at 898-900. Congress did so by stating that "[a]n action in a court of the United States seeking relief other than money damages • • • shall not be dismissed nor relief therein be denied on the ground that it is against the United States ...." 5 U.S.C. 702.

The issue in this case is whether direct subcontractor enforcement of *Pearlman* rights seeks relief "other than money damages." For several reasons, this Court should conclude that enforcement of an equitable lien does *not* present a money damages claim. First, an equitable lien is historically distinct from damages. It is a charge, or security interest, on specific property. As its name implies, it is an equitable remedy, and thus stands in contradistinction to damages, a traditional legal remedy. Second, as specific relief, the equitable lien fits squarely within this Court's definition in *Bowen* of relief "other than money damages." 5 U.S.C. 702. The equitable lien does not *substitute* for a loss; instead it gives the claimant the "very thing" to which it is entitled. *Bowen*, 487 U.S. at 896. This is especially apparent as regards equitable liens on construction balances; the lien is limited to retained funds, if any, held by the owner. Damages, by contrast, would provide a judgment executable

against the owner's general assets. Third, the equitable lien is *limited*. Respondent is not asking for the government to pick up the tab whenever the prime contractor was supposed to pay, but did not. That would be damages. Rather, Respondent seeks to be paid from remaining funds, if any. If no funds remain, then there is nothing to lien. In this regard, Respondent seeks nothing more than the ability--which sureties have had for decades--to enforce payment from remaining contract monies. The plain language of Section 702 gives Respondent that right.

Try as it might, Petitioner is unable to demonstrate that an equitable lien constitutes damages. Applying *Bowen*'s test, Petitioner argues that giving Blue Fox money would substitute for its loss. But Petitioner's substitutionary arguments are directed toward theories Respondent is *not* advancing. Blue Fox does not seek to impose liability for deleting the Miller Act bond requirement, however lawless that may have been. Nor does Respondent seek money as a *substitute* for what Verdan failed to pay; under that theory, Blue Fox should be made whole, irrespective of the content of the fund. Finally, Petitioner argues that the liened fund "no longer exists," and an award of money from elsewhere must be damages. But that overlooks settled law that the government has the obligation as stakeholder to pay the proper party; it runs the risk of paying twice when disregarding valid claims. Moreover, the government cannot pay out money after a party has filed suit to enjoin transfer. Pending lawsuits cannot be so easily disposed of.

Perhaps recognizing that an equitable lien differs from damages, Petitioner directs attention away from the unambiguous language of the statute, and toward an Appropriations Clause argument. But payment of an equitable lien does not raise an Appropriations Clause issue. First, an equitable lien is payable from the contract balance;

thus a new appropriation is not called for. Second, Petitioner's reliance on this Court's decision in *OPM v. Richmond*, 496 U.S. 414 (1990) is misplaced. In *Richmond*, a statute *forbade* payments to persons in Mr. Richmond's income level. Invoking the Appropriations Clause, this Court refused to force the government to pay a claimant otherwise statutorily ineligible. By contrast, no statute prohibits the government from paying Respondent here. On the contrary, Congress (through its accounting arm the General Accounting Office) has *encouraged* such payments. So has the Court of Claims. Third, since a lienable fund has been identified, this case does not present the broader appropriations issues Petitioner suggests. This Court need not decide here all the types of equitable claims section 702 allows.

Petitioner also argues that the APA was never intended to permit this type of suit. The government complains that neither the Ninth Circuit nor Respondent ever identified the precise "agency action" being challenged. However, until its brief on the merits to this Court, the Army never asked for an explanation. Since this Court ordinarily does not consider issues not raised or resolved below, Petitioner's "agency action" argument should not be considered. In any event, the Army's failure to honor Blue Fox's request for "suspension or reduction" in payments to Verdan, falls squarely within the definition of "agency action" as contained in 5 U.S.C. 551(13). Even if it did not, APA review would be proper. Congress intended Section 702 to waive immunity for challenges to *all* illegal governmental conduct, not just that falling within the technical definition of "agency action" in the APA.

Petitioner also argues that, in any event, the Tucker Act impliedly forbids the Section 702 waiver. But the plain language of section 702 states that "Nothing herein • • • confers authority to grant relief if any other statute *that grants*

consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702 (emphasis added). This exception does not apply because the Tucker Act does not grant consent *to Respondent's suit*. Respondent asserts equitable rights arising from federal common law. The Tucker Act does not permit that kind of suit. The Army also argues that even if the Tucker Act does not impliedly forbid this action, the Miller Act does. However, this argument was raised and rejected in *Pearlman*, and several lower courts since. This Court should reject it again.

Finally, Petitioner stresses throughout the poor track record to date of subcontractors suing the government. But because immunity has been waived, those authorities -- no matter how extensive or well-settled earlier -- no longer bar federal court jurisdiction. Congress intended to give citizens the right to challenge in court the legality of governmental conduct that adversely affects its interests. Blue Fox should be treated no differently solely by virtue of its status as subcontractor.

ARGUMENT

I. RESPONDENT'S EQUITABLE LIEN ACTION PRESENTS A CLAIM "OTHER THAN MONEY DAMAGES" FOR WHICH 5 U.S.C. 702 WAIVES IMMUNITY

A. Respondent Seeks To Enforce Equitable Rights Which Arise By Operation Of Law

This suit seeks to declare and enforce equitable rights. The rights of unpaid laborers and materialmen to payment from unexpended contract balances are long-recognized in this Court's decisions. To understand the nature of these rights -- and why they are not "money damages"-- it is useful to first consider this Court's decisions upholding the equitable subrogation rights of sureties under federal contracts. Those decisions depend and rely on the well-established equitable rights of subcontractors to impose liens upon prime contract funds.

In *Prairie State Bank v. United States*, 164 U.S. 227 (1896), this Court held that a surety, who completed a project following the contractor's default, had a right to moneys retained by the government superior to that of a bank which lent money to the defaulting contractor. The Court based its decision on the doctrine that a surety who completes a contract has an "equitable right" to indemnification out of a retained fund. *Prarie State Bank, supra*, at 231. In *Henningsen v. United States Fidelity & Guar. Co.*, 208 U.S. 404 (1908), the Court extended the *Prairie State Bank* holding to provide that a surety who satisfied the claims of unpaid laborers and materialmen had an equitable right to retained moneys. In holding that the surety's equity was superior to that of a competing lender, the Court specifically noted that the government had "equitable obligations to see that the

laborers and supplymen were paid." *Henningsen, supra*, at 410.

In *United States v. Munsey Trust Co.*, 332 U.S. 234, 241 (1947), this Court refused to protect a surety's subrogation claim to retained moneys held by the government, against the government's own claim to offset money it was owed. However, just 15 years later, in *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962), this Court reaffirmed a surety's rights to equitable subrogation. The *Pearlman* Court rejected an argument that *Prairie State Bank* and *Henningsen* had been overruled by *Munsey*. In so holding, Mr. Justice Black reiterated that "the laborers and materialmen had a right to be paid out of the fund...." *Id.* at 141.

On *Pearlman*'s authority, the lower courts now routinely authorize equitable liens under which unpaid subcontractors --in the absence of any implied or express contract with the owner-- are paid out of unexpended contract balances. As the Amicus Brief for the Surety Association of America states, "If a surety has a claim to contract funds by virtue of its subrogation to the rights of a subcontractor whom it paid, logically the subcontractor can assert the rights itself if there is no surety." See Brief Amicus Curiae of The Surety Assoc. of America [Supp. Neither Party] at 12 and authorities cited therein. Indeed, the surety's lien could not exist without the subcontractor's lien from which it is derived. See *Active Fire Sprinkler Corp. v. United States Postal Serv.*, 811 F.2d 747, 756 (2d Cir. 1987) ("[a]ny rights held by the sureties were founded upon the rights of the unpaid laborers and supp s.").

Applying this rationale, at least three circuit courts of appeal have permitted unpaid subcontractors to directly enforce equitable liens against the United States Postal Service ("USPS") under the authority of 39 U.S.C. 401, which

permits the Postal Service to sue and be sued. See *Active Fire Sprinkler Corp., supra*, at 754 ("[a]ny equitable rights held by subcontractors as against USPS, which may have been unenforceable where sovereign immunity existed, became enforceable upon immunity being waived."); *Kennedy Elec. Co., Inc. v. United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974); *Wright v. United States Postal Serv.*, 29 F.3d 1426 (9th Cir. 1994).

Because the contracting party here is the United States, 5 U.S.C. 702 waives sovereign immunity. The United States, like the U.S.P.S., may now be charged with subcontractor equitable liens. Petitioner argues, however, that "[b]ecause Respondent's suit seeks 'money damages' it is outside the scope of the waiver of immunity in 5 U.S.C. 702." First Argument Heading, Pet. Br. 13. The issue thus is whether an equitable lien seeks "money damages" under Section 702.

B. Section 702 Waives Immunity For Equitable Liens, Which Are Not "Money Damages"

The plain language of Section 702 waives immunity for Respondent's claim. In relevant part, 5 U.S.C. 702 provides:

> *An action* in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority *shall not be dismissed nor relief therein be denied on the ground that it is against the United States* or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added).

This statutory mandate could not be more clear: Congress has declared that immunity bars damages claims *only*. Thus, unless Respondent seeks *money damages*, sovereign immunity has been waived.

1. An Equitable Lien is Historically Distinct From Damages

"An equitable lien is a charge which will be enforced in equity against specific property, though there is no valid lien at law;" McClintock, *McClintock on Equity*, § 118, 319 (2d ed. 1948) [hereinafter McClintock]; see also *Restatement of the Law, Restitution* § 161 (1937) ("[w]here property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises."); see also Pomeroy, *Equity Jurisprudence*, Section 1233 (5th ed. 1941) [hereinafter Pomeroy] ([a]n equitable lien "is simply a right of a special nature *over* the thing, which constitutes a charge or encumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists.") (emphasis in original).

"The term 'equitable lien' is used in at least two fairly disparate senses. In one sense it may refer to a lien created by express or at least implied-in-fact agreement of the p[illegible]ties...." 1 D. Dobbs, *Law of Remedies* 601 (2d ed. 1993) [hereinafter 1 D. Dobbs]. "The equitable lien when imposed, not as a matter of contract, but to prevent unjust enrichment, is essentially a special, and limited, form of the constructive trust." *Id.* See also McClintock, *supra*, at 319 ("[e]quitable liens fall naturally into two distinct groups: Those created to give effect to an intention of the parties to secure payment of

an obligation * * * and those created by the court, regardless of the intent of the parties, as a remedial device to protect a party against some inequitable loss.").

It is this second type of equitable lien, the "special, and limited, form of the constructive trust" which Respondent seeks to enforce here. 1 D. Dobbs, *supra*, at 5. Although both the equitable lien and the constructive trust are restitutionary devices, there is a distinction:

> The lien is imposed for reasons that, in principle, are the same as those that warrant the constructive trust and it works in substantially the same way. [footnote omitted] The difference is that restitution is measured differently. Where the constructive trust gives a complete title to the plaintiff, the equitable lien only gives him a security interest in the property, which he can then use to satisfy a money claim. Thus an equitable lien may be 'foreclosed', so that the property that has been subjected to the lien is subjected to a forced sale and the proceeds of that sale applied to payment of the plaintiff's claim. [footnote omitted] This results in only a money payment to the plaintiff and obviously does not carry with it the advantages of recovering specific property. On the other hand, it operates like the constructive trust in affording a preference over other creditors and in utilizing the rules for following property into its product.

Id. (emphasis added); see also 2 D. Dobbs, *Law of Remedies* 5 (2d ed. 1993) [hereinafter 2 D. Dobbs] ("a constructive trust is an order that the defendant transfer an identified fund or property to the plaintiff, in specie. [footnote omitted] An equitable lien is a lien placed upon specific funds or property to secure the plaintiff's rights to restitution in money."

[footnote omitted].).

Since an equitable lien provides restitution, it is distinct from damages. See 3 D. Dobbs, *Law of Remedies* 9 (2d ed. 1993) [hereinafter 3 D. Dobbs] ("[r]estitutionary recoveries are based on the defendant's gain, not on the plaintiff's loss. Restitution is thus distinct from damages, which measures compensation for loss rather than disgorgement of the defendant's gain."). Thus, this Court has held that actions to disgorge improperly gained profits, *Curtis v. Loether*, 415 U.S. 189, 197 (1974), and to return funds rightfully belonging to another, *Tull v. United States*, 481 U.S. 412, 424 (1987) are equitable actions, even though the relief they seek is monetary, because they are restitutionary in nature. See also *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993) (listing restitution as an example of "a remedy traditionally viewed as 'equitable'.").

Even though the equitable lien deals exclusively with the payment of money, it is a peculiarly equitable remedy. See *Houston v. Ormes*, 252 U.S. 469, 474 (1920) (recognizing an equitable lien as "an equitable right in the fund"); see also 2 D. Dobbs, *supra*, at 8 ("[t]he constructive trust and equitable lien are equitable remedies."); see also Pomeroy, *supra*, § 1234 (referring to the equitable lien: "There is perhaps no doctrine which more strikingly shows the difference between the legal and the equitable. . . ." quoting *Society of Shakers v. Watson*, 68 F. 730, 15 C.C.A. 632, 37 U.S. App. 141.); see also *Clews v. Jamieson*, 182 U.S. 461, 479 (1901) (1895) ("[t]he fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity", quoting Pomeroy, *supra*, § 158 (constructive trust)).

The equitable lien thus stands in contradistinction to "damages," an historically legal remedy. See *Mertens*, 508

U.S. at 255 ("[m]oney damages are, of course, the classic form of *legal* relief") (emphasis in original); see also *Curnden v. Middleton*, 232 U.S. 633, 636 (1914) ("[t]he relief sought is simply a decree for damages * * * so that although the word restitution is used there is no attempt to rescind, to follow a specific fund or to establish a trust. Being a suit for damages the proper remedy is an action at law.").

2. An Equitable Lien Falls Outside *Bowen*'s Definition Of Damages

In *Bowen*, the state of Massachusetts sought to compel the Secretary of Health and Human Services to make reimbursement for certain Medicaid-related expenditures. This Court determined the relief to be "other than money damages," and upheld Section 702 jurisdiction. The Court drew a distinction between damages, which are given to substitute for a suffered loss, and specific remedies, which "'are not substitute remedies at all, but an attempt to give the plaintiff the very thing to which he was entitled.'" *Bowen*, 487 U.S. at 895. In so holding, the Court stated that "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Id.*, at 893.

Applying *Bowen's* test for damages, the equitable lien does not "substitute" for a loss. *Id.*, at 895. Rather, as "a charge which will be enforced in equity against specific property," McClintock, *supra*, § 118 at 319, the claimant is given "the very thing to which it is entitled." *Bowen*, 487 U.S. at 895. See also *Armstrong v. United States*, 364 U.S. 40, 44 (1960) (recognizing that subcontractors holding liens "were entitled to resort to the specific property for the satisfaction of their claims."). Granted, the equitable lien results in the payment of money. See *Restatement (Third) of Suretyship and Guaranty*, p. 11, cmt. b ("Where the

equitable lien is on a fund, for example a bank deposit, it is enforced by a direction to pay the claimant out of the fund."). However, "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen*, 487 U.S. at 893. See also 3 D. Dobbs, *supra*, at 9 ("[i]f the theory for the claims is 'restitution' based upon the defendant's unjust enrichment, then the recovery is not 'damages' even if, in dollar amount, it is equivalent to a compensatory damages recovery.").

Moreover, in the case of equitable liens on construction balances, the lien is limited to retained funds, if any, held by the owner, see 3 D. Dobbs 471, *supra*, and cannot exceed the amount of funds held by the landowner. *Id.* Thus, if insufficient funds remain, the subcontractor is out of luck; he is not made "whole," since the lien "is not a claim against the landowner's general assets." *Id.* In such situations, the unpaid subcontractor is left uncompensated. This stands in distinction to "damages," where the claimant receives a compensatory award enforceable by execution or garnishment. D. Dobbs, *Handbook on the Law of Remedies*, Sections 1.3, 10-11; 3.1, 135 (1973) [hereinafter D. Dobbs]. This limitation also underscores that the claimant is awarded specific relief, in a defined fund.

3. Petitioner Fails To Demonstrate That An Equitable Lien Is "Damages"

Petitioner apparently does not dispute Respondent's characterization of the equitable lien as a limited security device. See Br. in Opp. 7, n. 6 (where Respondent demonstrates that the lien does not extend to the landowner's general assets, and cannot exceed the landowner's retained funds). Nevertheless, Petitioner argues that Blue Fox's contract was with Verdan, not the Army, and "by requiring

the government to pay when Verdan did not, the Ninth Circuit provided precisely the sort of 'substitute' performance barred as money damages under the APA." Pet. Br. 28. That misreads Blue Fox's theory, however, because it denies the existence of the equitable rights which *Henningsen*, *Pearlman* and its progeny recognize as inhering in retained funds for the subcontractor's benefit. Absent that body of law, ordering that the Army pay as a "substitute" for Verdan's failure to pay perhaps *could* be compensation for a loss. But, under that theory, liability would extend to the government's (or owner's) general assets, and would remedy the subcontractor's full loss, even where no contract balance remained. The existence of those limitations makes crystal clear that the equitable lien is not "money damages."[2]

a. Dissipation of Contract Monies Did Not Create a "Money Damages" Claim

Apparently conceding the power of this distinction, Petitioner asserts that the "very fund" to which the lien attached "no longer exists." Pet. Br. 30, n. 13. As a consequence, Petitioner argues that Respondent seeks a "substitute remedy" barred as "money damages" under *Bowen*. This argument fails for several reasons.

First, federal courts have consistently held that, when

[2]Noting that Respondent's Complaint sought interest, Petitioner states that "[p]resumably the interest was intended to compensate plaintiff for the lost use of the funds." Pet. Br. 28, n. 11. However, if the fund is the "very thing" to which a claimant is entitled, so should the expanded fund due to interest. As Professor Dobbs states, "[t]he trust or lien may attach to the fund or account even if the fund has grown through dividends or interest or identifiable earnings or savings. [footnotes omitted]. Because the fund is the plaintiff's its product is the plaintiff's in the same way that when the plaintiff owns the cow he also owns the calf." 1 D. Dobbs, *supra*, at 5, n.5.

the government pays out funds while on notice of a surety's claim of lien, it does so at its peril. See *Newark Ins. Co. v. United States*, 169 F. Supp. 955, 957 (Ct. Cl. 1959) ("[s]urely a stakeholder, caught in the middle between two competing claimants, cannot, if effect, decide the merits of their claims by the mere physical act of delivering the stake to one of them."); *Home Indem. Co. v. United States*, 376 F.2d 890 (Ct. Cl. 1967) ("the Government had no right as a stakeholder to settle the question unilaterally by paying the fund to the contractor."); *Transamerica Premier Ins. Co., v. United States*, 32 Fed. Cl. 308-314 (1994) ("where the government has on hand contract funds owing for work done and is alerted . . .to the possibility of unpaid materialmen's claims. . . it may not dispense those funds to the contractor--at least not without running the distinct risk of having to pay twice."). See also Brief Amicus Curiae of The Surety Assoc. of America [Supporting Neither Party] at 18-19, Part D. ("The Army Could Not Decide the Competing Claims of Blue Fox and Verdan by Paying the Wrong Party), and authorities cited therein.[3] Petitioner's argument is inconsistent with these settled authorities.[4]

[3]See also the Army attorney's concession to the Ninth Circuit: ("once the government's on notice, then if the government goes ahead and pays contract funds to the defaulting general contractor, then they run the risk of paying twice."). See Br. in Opp. 21-22, n. 23, quoting Transcript of Oral Argument by Government Counsel (lodged with the Supreme Court Clerk), [hereinafter Transcript] at 7-8.

[4]Petitioner seeks to distinguish *Prairie State Bank*, *Henningsen* and *Pearlman* as "contests between private parties over funds as to which the United States has disclaimed any ownership, and had transferred out of the Treasury." Pet. Br. 37. However, as *Newark Ins. Co.* and its progeny demonstrate, the United States becomes a "stakeholder" of any funds which are due and payable under the contract once on notice of liens to remaining funds. See Amicus Brief of the Surety Assoc. of America [Supp. Neither Party] at 6-7 and authorities cited therin. That result should not turn on the physical presence of the funds, inside or outside the Treasury. As this Court has

Second, there is no reasoned basis to limit this doctrine to sureties. Indeed, the Second Circuit has enforced this rule in the distinct case of an unpaid subcontractor. As the court stated:

> One might argue that because Active never sought an injunction preventing USPS from making any payments pending the disposition of this lawsuit it is effectively estopped from arguing that its position has eroded over time. This argument must fail. When USPS became aware of Active's claim, it was placed on notice of the possibility of a recovery against it. It also should have recognized the risk that it faced if

acknowledged in other circumstances, private claimants may hold an equitable interest on monies in the Treasury. See *Houston v. Ormes*, 252 U.S. 469, 474 (1920) (recognizing an equitable lien for attorneys fees upon a $1,200 fund, held in the Treasury, appropriated to pay the attorney's client); *Mellon v. Orinoco Iron Co.*, 266 U.S. 121 (1924) (recognizing claimant's equitable right in a $56,250 fund, held in the Treasury, which was received by the Secretary of State from Venezuela in satisfaction of claimant's claim). Nor does the fact that the government continued to possess the liened funds serve to invalidate the unpaid subcontractor's lien. Thus, in *Armstrong v. United States*, 364 U.S. 40, 46 (1960), the Court held that conveyance to the government of a defaulting contractor's title to boat hulls did not invalidate subcontractors' prior liens. As the Court stated, "[a]fter transfer to the United States, the liens were still valid, *United States v. Alabama*, 313 U.S. 274, 281-282 (1941), but they could not be enforced because of the sovereignty of the Government and its property from suit [footnote omitted]." Similarly, in *United States v. Alabama, supra*, the Court recognized that Alabama had a valid tax lien, albeit unenforceable, in land held by the United States. As the Court stated, "we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date." *United States v. Alabama, supra*, at 282.

> it paid the money out to other parties. USPS cannot complain that Active did not try to prevent it from taking that risk.

Active Fire Sprinkler Corp., 811 F.2d at 757.[5]

Third, this result is especially compelling as to funds paid out after Blue Fox filed suit to enjoin transfer.[6] This Court has held that a party cannot "moot" a case through such conduct. See *Porter v. Lee*, 328 U.S. 246, 251 (1945) ("[i]t has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo*."); accord *Porter v. Warner Holding Co.*, 328 U.S. 395, 399, n.2 (1946); *Texas & N.O.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928). Restoring the *status quo*, on these facts, would provide Respondent the "very thing" to which it is entitled. *Bowen*, 487 U.S. at 895.

[5]Thus, it is no answer to assert that Respondent never sought preliminary relief. Pet. Br. 30, n. 13. An injunction "is not a remedy which issues as of course...." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 310 (1981) quoting *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-339 (1933). The district court would have denied preliminary relief in any event, since it eventually dismissed the case for lack of jurisdiction. Pet. App. 30a ("The court concludes that it does not have jurisdiction to determine the claim of Blue Fox against the Army."). Even if an injunction had issued, it would have dissolved upon dismissal, and the Army could have "paid out the monies to which the lien attached," Pet. App. 12a, at that point.

[6]In its Complaint, Blue Fox prayed *inter alia* "for an injunction enjoining Defendants from paying any further moneys under Contract Number DAEA08-93-C-0056 [the Verdan contract], or making any payments from funds available or appropriated for a follow-on contract for completion of the Umatilla Army Depot Electronic Switching System project, until Plaintiff's unpaid bill is satisfied." Pet. App. 40a.

Fourth, the holding in *City of Houston v. HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) does not change this result. In that case, because funding had lapsed, the court found that "an award of monetary relief from any other source ... would constitute money damages." *City of Houston, supra*, at 1428. However, *City of Houston* involved *expired* budget authority; the court found that the case "was mooted by the expiration of the relevant appropriation...." *Id.* at 1426. Here, however, no appropriation "lapse" has been alleged, let alone identified by Petitioner. In any event, the court's statement that "unobligated funds revert back to the Treasury," *Id.* at 1426, appears inconsistent with current law, under which unobligated balances retain their fiscal identity in an expired account for five years.[7] In any event, Congress

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[7]See Pub. L. No. 101-510, 104 Stat. 1485 (1990) (relevant law beginning at 1675), codified at 31 U.S.C. 1551-1557.

31 U.S.C. 1552(a) provides:

> On September 30th of the 5th year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.

31 U.S.C. 1553(a) provides:

> After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting and liquidating obligations properly chargeable to that account.

Thus, these balances remain with the federal agencies and are available

has provided that lawsuits and "rights of action" remain unaffected by any provision of law requiring return of expired balances to the general fund of the Treasury.[8] Thus, the $84,910.52, transferred to DCI for completion of the Verdan contract work and "other work," remains subject to Respondent's lien.[9]

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to liquidate obligations and effect adjustments. See generally, United States General Accounting Office, Principles of Federal Appropriation Law, 5-57 et seq (1994).

[8]31 U.S.C. 1502(b) provides:

> A provision of law requiring that the balance of any appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance.

See also *West. Va. Ass'n of Community Health Ctrs. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984) ("an equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date, as long as the lawsuit was instituted on or before that date. [citation omitted] The doctrine has been likened to the equitable principles of constructive trust and equitable lien [citation omitted]."); see also Principles of Federal Appropriations Law, *supra*, 5-71 ("As long as the suit is filed prior to the expiration date, the court acquires the necessary jurisdiction and has the equitable power to 'revive' expired budget authority, even where preservation is first directed at the appellate level.").

[9]Respondent's suit was filed May 11, 1995. J.A. 1. On July 27, 1995, the Army issued "Modification P0006 to the DCI contract . . . for $126,772.78." Choate Aff., par. 13, J.A. 61; J.A. 41. "The Army paid for this modification by transferring the $84,910.52 left on the Verdan contract to the DCI contract. The balance was paid from other sources." Choate Aff. par. 14, J.A. 61. Since suit was filed more than two months prior to transfer, the $84,910.52 remains subject to Blue Fox's lien.

Lastly, payment to inferior claimants should not deplete the fund so as to prevent payments of available and appropriated funds to authorized recipients. Even assuming *arguendo* that the specific liened fund "no longer exists," that would be so only because the current state of bookkeeping entries[10] reflects authorized payments to Verdan and DCI. Once a reviewing court determines that continued payment to the prime contractor was arbitrary and capricious, or an abuse of discretion,[11] those payments should not be considered authorized. See also *Bausch & Lomb Optical Co. v. United States*, 78 Ct. Cl. 584, 607, cert. denied, 292 U.S. 645 (1934) ("Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforceable against it.").

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[10]As Professor Dobbs has remarked, "It is sometimes said that money has no earmarks, meaning that specific monies cannot ordinarily be identified as the plaintiff's. But most of what passes for 'money' today is nothing more than a bookkeeping allocation in any event, and the law generally treated bookkeeping entries--accounts--as identified monies in many circumstances...." 2 D. Dobbs, *supra*, at 13, n.10.

[11]Where liens are asserted by sureties, the courts allow government officials discretion in deciding whether to continue paying the prime contractor, where work remains. See *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1164-1165 (Fed. Cir. 1985) (articulating eight factors to consider "in determining whether the Government has exercised reasonable discretion in distributing funds."). The reviewing court decides if the determination was arbitrary and capricious, or an abuse of discretion. *Id.*; see also *Argonaut Ins. Co. v. United States*, 434 F.2d 1362, 1368 (Ct.Cl. 1970); see also Br. Am. Surety Assoc. of America at 6-7, and authorities therein.

b. Petitioner's Remaining "Damages" Arguments Misapprehend Respondent's Claim

Petitioner's remaining discussion of *Bowen's* damages/specific relief distinction misses the mark, as it is directed at relief which Respondent is *not* seeking. For example, Petitioner asserts that "money damages" would result if the Army's liability stemmed from its failure to ensure that a Miller Act bond was posted. Pet. Br. 24; 27-28. But that misreads Respondent's claim. The rights Blue Fox asserts are *not* based upon the failure to ensure that a bond was in place. Granted, Respondent pleaded that Petitioner failed to ensure that a Miller Act payment bond was furnished. Pet. App. 37a. That failure, including the government's "conscious avoidance of the Miller Act requirements," Pet. App. 13a, n.6, enters into the equitable equation. Cf. *In Re Pyramid Industries, Inc.*, 210 B.R. 445, 456 (N.D. Ill. 1997) ("[w]here the United States has failed to insure the proper protection to subcontractors directed by the statute, the equities favor the unpaid subcontractors...."). It is not, however, the source of Respondent's rights. Thus, cases refusing Federal Tort Claims Act relief to unpaid subcontractors are inapplicable. Pet. Br 26, n. 9.[12] Similarly, Respondent's theory is *not* that the Miller Act implies a private right of action. Thus, Petitioner's observation that "the Miller Act imposes no substantive obligation to pay federal funds to subcontractors" (Pet. Br. 25) is also beside the point.

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[12]One such case supports Respondent's position that an equitable lien is not money damages. See *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 651 (9th Cir. 1992) (Since FTCA only permits money damage awards, "there is no jurisdiction under the FTCA to award an equitable lien.").

C. The Appropriations Clause Does Not Bar Relief

Enforcement of Respondent's equitable lien does not raise an Appropriations Clause issue. The Appropriations Clause, U.S. Const. art. I, § 9, cl. 7 provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * * ." Relying on that Clause, this Court in *OPM v. Richmond*, 496 U.S. 414, 432 (1990), refused to apply the doctrine of equitable estoppel to require the government to make payments to a claimant otherwise statutorily ineligible. In *Richmond*, to award respondent the relief he requested would be to force the government, because of misstatements by a benefits eligibility counselor, to pay the respondent funds that Congress had specifically rendered unavailable to persons at his income level. Congress had amended the statute to deny eligibility to persons in Mr. Richmond's position. For the agency to pay Mr. Richmond would violate specific statutory prohibitions. *Id.*, at 432 ("[h]ere, the relevant statute *by its terms* excludes respondent's claim....") (emphasis added). *Richmond* thus stands for the proposition that federal courts may not force federal agencies to overreach their statutory authority in paying relief out of the public fisc.

The instant case stands in stark contrast to *Richmond*. Here, no statute prohibits the government from paying unexpended contract monies to an unpaid subcontractor. To the contrary, voluntary payments to subcontractors have been encouraged both by the courts and the General Accounting Office.[13] The Court of Claims has repeatedly urged the

[13]When GAO was established by the Budget and Accounting Act of 1921, the Comptroller General was given broad claim settlement jurisdiction. "Except as provided in this chapter or another law, the Comptroller General shall settle all claims of or against the United States government." 31 U.S.C. 3702(a). Pub. L. No. 104-53, 109 Stat. 514, 535 (1995) transferred the claims settlement function of the General Accounting Office to the Office of Management and Budget effective June 30, 1996. For seventy-five years, the Comptroller General issued decisions on claims against the United States. The settlement function included determination of whether an appropriation is legally available for making payment. 18 Comp. Gen 285, 292 (1938). These cases have value as precedent and include decisions authorizing payment to sureties and subcontractors. See Principles of Federal Appropriations Law, *supra*, pp. 12-89 to 12-99 (1994).

government, where possible, to voluntarily pay its subcontractors because it has an obligation (albeit unenforceable in the Court of Claims) to do so. See *United Elec. Corp. v. United States*, 647 F.2d 1082, 1087 (Ct. Cl.), cert. denied, 454 U.S. 863 (1981) ("[a]s we have done before, we stress that the United States may choose to make payment.").[14]

[14]The Court of Claims has remarked that a subcontractor lacks standing to sue the government. See *United Electric Corp. v. United States*, 647 F.2d 1082, 1087 (Ct. Cl.), cert. denied, 454 U.S. 863 (1981) ("United has no standing to sue the United States for recovery of its compensation."; *United States Fidelity & Guar. Co. v. United States*, 475 F.2d 1377, 1382 (Ct. Cl. 1973) ("the Court declines to grant the subcontractors' standing to sue for the amount retained by the Government under the contract."). However, Petitioner has not raised a standing argument here, apparently because the APA clearly provides standing to bring suit. Thus a parallel exists to cases involving disappointed bidders under federal contracts. It was once settled that an unsuccessful bidder had no standing to challenge the legality of the bidding procedure. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Edelman v. Federal Housing Administration*, 382 F.2d 594, 597 (2d Cir. 1967) ("Bidding procedures are for the public benefit generally and confer no private rights on the bidder.") However, in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), the court stated that "[t]he law of standing was greatly modified by the passage of the Administrative Procedure Act [citing 5 U.S.C. 702 (Supp. IV 1965-68)]," *Scanwell*, *supra*, at 865, and upheld a disappointed bidder's standing to challenge an award of government contract as arbitrary and capricious. In terms of standing, it makes little sense to define the class of those injured by arbitrary or capricious government action to include disappointed bidders, but exclude

More importantly, the General Accounting Office--Congress's own accounting arm--has approved payments from unexpended contract balances to both sureties and unpaid subcontractors. See B-190144, Comp Gen. 176, 178 (1977) ("[w]e recognize, however, that Wilson [the unpaid subcontractor] may have an equitable claim to the contract retainage of $7,033. * * * Therefore, we recommend that the Navy take steps to assure that the rights of all parties are adequately determined prior to any payment from the contract retainage."). See also *Id.* at B-218813, April 9, 1986 ("[a]lthough there is no privity of contract between the United States and the subcontractors so as to warrant settlement of their claims by the Government, both this Office and the courts have recognized that the Government has a nonenforceable equitable obligation to see that subcontractors are paid.").[15]

Petitioner nevertheless argues that the Appropriations Clause requires a "substantive right to compensation based on the express terms of a specific statute" before money can be paid to Respondent. Pet. Br. 17 quoting *Richmond*, 496 U.S. at 432. Petitioner's argument, however, seeks to extend *Richmond's* language far beyond its facts. *Richmond* said nothing whatsoever about payment from unexpended federal

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unpaid subcontractors. Indeed, as Blue Fox's current plight aptly demonstrates, subcontractors' interests are even more directly affected by lawless governmental conduct.

[15]Even if this Court determines that payment to Respondent is "money damages," Respondent would still be entitled to injunctive relief with prospective effect. See Am. Br. for the Surety Assoc. of America at 23-28. For the reasons and authorities stated therein, the district court had jurisdiction in any event to enter an order preserving the contract balance for any reason other than project completion and payment of Blue Fox. This would include preservation of the contract balance pending a request for claim settlement advice from the General Accounting Office (or its successor, the Office of Management and Budget.)

contract balances. Nor did *Richmond* interpret Section 702; it said nothing about what constitutes relief "other than money damages." To the contrary, *Richmond* concerned *money damages* entitlement. Indeed, *Richmond*'s insistence "on a substantive right to compensation based on the express terms of a specific statute" relies for its very support "on our leading case on jurisdiction over claims against the Government, *United States v. Testan*, 424 U.S. 392 (1976)." *Richmond*, 496 U.S. at 432. *Testan*, of course, sets the rules for determining whether *money damages* are available in the Court of Federal Claims. This provides little help in resolving what constitutes relief *other than* money damages.

D. Section 702 Is Not Limited To Claims Enforcing Statutory Mandates

1. Nothing in the APA, Its Legislative History, nor in *Bowen*, Is So Limiting

Petitioner argues that *Bowen* claims should be limited to those seeking to enforce a statutory entitlement to money. See Pet. Br. 23. ("[T]he claim [in *Bowen*], the Court explained, merely sought 'to enforce the statutory mandate itself, which happens to be one for the payment of money. [*Bowen*,] 487 U.S. at 900. The same cannot be said of respondent's suit here."). However, nothing in *Bowen*, the APA, or its legislative history supports such a restriction.

To be sure, the claimant in *Bowen* sought to enforce rights to money created by a statute. At issue, however, was the government's request that this Court "substitute the words 'monetary relief' for the words 'money damages' actually selected by Congress." *Bowen*, 487 U.S. at 896. The *Bowen* Court rejected that argument and, in the process, rejected Petitioner's current argument as well. Quoting the legislative

history, the Court stated that Congress intended to "'eliminate the sovereign immunity defense in *all equitable actions for specific relief* against a Federal agency or officer acting in an official capacity.'" quoting *Maryland Dep't of Human Resources v. HHS*, 763 F.2d 1441, 1444 (D.C. Cir. 1985), quoting in turn H.R. Rep. No. 1656, 94th Cong., 2d. Sess. 9 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); U.S. Code Cong. & Admin. News 1976, p. 6129 (emphasis in original). *Bowen*, 487 U.S. at 898-900. "That sweeping declaration strongly suggests that Congress intended to authorize equitable suits for specific monetary relief as we have defined that category." *Id.*[16]

As in *Bowen*, the government again seeks to replace the words "money damages," actually selected by Congress, with limiting words more to its liking. However, since Congress included no limitation for claims enforcing a "money-mandating statute," this Court should decline Petitioner's request to re-write the statutory text. As the *Bowen* Court stated, "only the most compelling reason could justify a revision of a statutory text that is this unambiguous." Id. at 896. Petitioner has provided none here. As the Ninth Circuit correctly concluded, therefore (and as Petitioner's attorney conceded to that panel), see Br. in Opp. 9-11, there is no requirement in *Bowen* or the APA that the specific relief requested be statutorily granted." Pet. App. 8a. Accord *Aetna Cas. & Sur. Co.*, 71 F.3d at 479 (2d Cir. 1995) ("[w]e see no reason why the duty to pay money should not be equally enforceable under the APA regardless whether the

[16]In the ten years since *Bowen* was decided, Congress has left its holding undisturbed, signaling its agreement with this Court's decision. *Bowen*'s stare decisis value is strong. See *Illinois Brick Co. v. Illinois*, 431 U.S 720, 736 (1977) ("we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

duty arises by statute, regulation, or operation of law.").[17]

2. An Equitable Lien Is Distinguishable From Back Pay

For several reasons, Petitioner's reliance on *Hubbard v. Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc) is misplaced.[18]

First, Petitioner's *Hubbard* discussion misreads the holding below. Petitioner states that, in part, "the Ninth Circuit read Section 702 as distinguishing between 'law' and 'equity.'" However, any such distinction is not apparent in the opinion. Rather, the court applied *Bowen*'s test for determining whether a claimant seeks relief "other than money damages" under Section 702. Pet. App. 7a. Finding

[17]Moreover, to limit *Bowen* as Petitioner suggests would further blur the line separating district court and Court of Federal Claims jurisdiction. Obviously, the "money mandating statute" which Petitioner posits as the *sine qua non* of monetary relief under Section 702, would also be an "Act of Congress" upon which Tucker Act jurisdiction could be based. See 28 U.S.C. 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.") Under Petitioner's proposed limitation, district court jurisdiction under Section 702 would *necessarily* overlap Court of Federal Claims jurisdiction. It is unlikely that Congress intended such a result.

[18]In *Hubbard*, the plaintiff, whom EPA had wrongfully failed to hire, requested backpay along with instatement as part of an equitable remedy. A split panel of the D.C. Circuit concluded that back pay fell within the waiver of immunity for "relief other than money damages" in 5 U.S.C. 702. The *en banc* court found that Hubbard could not receive backpay "because Congress had not expressed an unequivocal intent to waive sovereign immunity for such relief." *Hubbard*, 982 F.2d at 532.

that "Blue Fox seeks an equitable lien only for the very thing to which it is entitled...." (i.e., specific relief), the court properly determined that Section 702 waives immunity. *Id.* Thus, much of Petitioner's *Hubbard* discussion is inapposite. See, e.g., Pet. Br. 31 ("'the line [S]ection 702 draws is not between actions at law and suits in equity.' *Hubbard*, 982 F.2d at 539 (Randolph, J., joined by R.B. Ginsburg, J., concurring). * * * ('What may qualify as an "equitable remedy" * * * is not synonymous with specific relief.')").

Second, *Hubbard* dealt with entitlement to backpay, a traditional compensatory remedy. ("[B]ack pay for someone in Hubbard's position has traditionally been understood at common law as 'damages,' not 'specific relief.'" *Hubbard*, 982 F.2d at 533. However, an equitable lien is not damages. See 2 D. Dobbs, *supra*, at 5 ("[a]n equitable lien is a lien placed upon specific funds or property to secure the plaintiff's rights to restitution in money." [footnote omitted]; 3 D. Dobbs, *supra*, at 9 ("[r]estitutionary recoveries are based on the defendant's gain, not on the plaintiff's loss. Restitution is thus distinct from damages, which measures compensation for loss rather than disgorgement of the defendant's gain.").

Third, unlike Hubbard, Blue Fox invested time and materials. In *Hubbard*, however, the plaintiff never performed any work. His claim was for "loss of income attributable to Hubbard's being denied the job...." *Hubbard*, 982 F.2d at 533. The court noted the result may well have been different had the plaintiff performed work for which he was not paid. ("We do not suggest that back pay must always be viewed as money damages and can never be properly categorized as specific relief. If Hubbard had been hired by the EPA and worked for the agency for a year without being paid, his legal claim might well be viewed differently. In that case, the money that Hubbard had a right to receive in exchange for his labor might well be the very thing that was taken from

him.") Id. at 533, n.4 .[19]

Lastly, the existence of a lienable fund distinguishes the backpay case. In the case below, the court merely redirected existing funds to the unpaid subcontractor, based upon longstanding equitable rights. No such fund existed in *Hubbard*.

II. RESPONDENT'S SUIT SEEKS JUDICIAL REVIEW OF AGENCY ACTION

Petitioner argues that an equitable lien action is not subject to APA review. According to Petitioner, the waiver of immunity in the 1976 amendment to the APA "is limited to the traditional forms of action that seek 'judicial review' of 'agency action,'" Pet. Br. 42, which exclude equitable lien actions. This argument fails.

First, this argument was not raised below. Petitioner correctly notes that neither the Ninth Circuit nor Respondent "attempted to explain how assertion of an 'equitable lien' claim is a suit for 'judicial review.'" Pet. Br. 43. However, until its brief on the merits to this Court, Petitioner never raised that point. Thus, this argument is not properly before the Court. See S. Ct. Rule 14.1(a) ("only the questions set out in the Petition or fairly included therein will be considered by the Court.) See also *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not

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[19] In like manner, the focus of Judge Randolph's concurring opinion (in which then Circuit Judge R.B. Ginsburg joined) was that Hubbard lost *the opportunity* to earn wages (as opposed to the wages themselves). The concurring opinion's first sentence summarized its rationale: "If Hubbard prevails, the Government will have to pay him money to make up for *the wages he never earned*." (emphasis added).

decide questions not raised or resolved in the lower courts.").[20]

Second, Blue Fox *does* seek review of "agency action" as defined in the APA. The Army is an "agency."[21] Respondent alleges "agency action."[22] That action includes the Army's continued payment of contract funds ($86,132.33 to Verdan (J.A. 34) and $84,910.53 to DCI (J.A. 61), after Blue Fox requested "suspension or reduction of payment ...by your agency." (J.A. 33)). This constitues "relief"[23] as defined

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[20]In its Petition for Certiorari, the Army set out the following question: "Whether 5 U.S.C. 702 permits respondent to bring an action in federal district court for an 'equitable lien' against the government to recover the amounts owed to respondent by the primary contractor." Pet. for Cert. I. Petitioner *did* state that "the Ninth Circuit majority did not identify the 'agency action' that allegedly caused respondent to suffer 'legal wrong' or 'adversely affected' respondent within the meaning of the relevant statute, 5 U.S.C. 702 -- and therefore did not even identify what agency action was being subjected to judicial review --." Pet for Cert. 20. However, Petitioner did *not* raise the argument that Section 702's waiver "is limited to the traditional forms of action that seek 'judicial review' of 'agency action.'" Pet. Br. 42.

[21]5 U.S.C. 551(1) provides.

"For the purpose of this subchapter--

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include * * *"

[22]5 U.S.C. 551 (13) provides:

"'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; "

[23]5 U.S.C. 551(11) provides:

"'relief includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

in 5 U.S.C. 551(11). The Army's "fail[ure] to act" constituted "agency action." 5 U.S.C. 551(13). Having thus "suffer[ed] legal wrong because of agency action," Respondent is "entitled to judicial review thereof." 5 U.S.C. 702. Thus, Petitioner's argument is not applicable to these facts.

Third, in any event, Section 702 waives sovereign immunity in *all* non-damages actions seeking relief from official misconduct, even if not technically defined in Section 551(13).[24] After an exhaustive review of the legislative history to the 1976 Amendments to the APA, the court came to just this conclusion in *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989). The court noted that

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(C) taking of other action on the application or petition of and beneficial to, a person."

[24]This conclusion is reinforced by the fact that, in passing the 1976 amendment to the APA, Congress intended to waive sovereign immunity in so-called "nonstatutory" cases. Cf. *Jaffee v. United States*, 592 F.2d 712, 718 (3rd Cir. 1979) (stating that legislative history to the 1976 Amendment to the APA "notes that acts of the older executive departments, such as the Department of Defense, are subject to judicial review only through 'nonstatutory' suits under [S]ection 1331. ...[t]hese suits are called 'nonstatutory' because they are not brought under the statutes that specially provide for review of agency action. *See* H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 6121, 6125. In these instances, judicial review is available, if at all, through actions involving matters which arise 'under the Constitution, Laws, or treaties of the United States' as provided in [S]ection 1331(a) of title 28. *Id.*") To limit Section 702 review to only "agency action" as defined in Section 551(13) would be inconsistent with Congress' desire to grant judicial review of the conduct of the older executive agencies. Moreover, the fact that Congress intended to allow "nonstatutory" review also makes it less likely that it intended that there be a statutory prerequisite to the issuance of specific monetary relief.

"[n]othing in the language of the amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of 'agency action.'" *Id.* at 525. Moreover, referring to the legislative history, the Court stated that Congress intended to do away with the need for fictions with which to circumvent sovereign immunity. As the Court stated, "Congress' plain intent in amending § 702 was to waive sovereign immunity for all such suits, thereby eliminating the need to invoke the *Young* fiction." *Id.* at 526.[25] See also *Chrysler v. Brown*, 441 U.S. 281 (1979) (decision to disclose trade secret information is "agency action" under Section 10 of the APA.").

III. RELIEF UNDER SECTION 702 IS NOT IMPLIEDLY FORBIDDEN BY OTHER STATUTES

A. The Tucker Act Does Not Impliedly Forbid Enforcement Of An Equitable Lien

Petitioner argues that the Tucker Act "impliedly forbids" the relief Respondent seeks. The government relies for support upon the final sentence of Section 702: "Nothing herein • • • confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702.

However, the Tucker Act does not grant consent *to*

[25]Petitioner states that the *Presbyterian Church* ruling is inconsistent with this Court's decision in *Lujan v. Defenders of Wildlife*, 497 U.S. 871 (1990). Pet. Br. 43-44, n.23. However, *Lujan* did not reach the issue Petitioner raises. As the Court stated, "[a]s for the 'agency action' requirement, we think that each of the affidavits can be read, as the Court of Appeals believed, to complain of a particular 'agency action' as that term is defined in [S]ection 551." *Id.* at 885.

Respondent's suit. In *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994), the Federal Circuit[26] rejected Petitioner's very argument, in the context of a developer's action to compel HUD to perform calculation of contract rents in accordance with regulations. As here, the government argued that the Tucker Act impliedly forbade the relief. However, in finding no implied preclusion, the court stated:

> The prerequisite to this prohibition, however, is that the statute which forbids the relief sought 'grants consent to suit,' 5 U.S.C. § 702, in this case that some relief be available in the Court of Federal Claims under the Tucker Act. But, as we have discussed, no relief is available in the Court of Federal Claims here because the case challenges the interpretation of law which controls payment to Hollywood Associates. It is not a contract case. Hollywood Associates does not seek declaratory relief in the performance of a contract, but seeks judicial interpretation of a federal regulation.

Id. at 1209; see also *id.* at 1210 ("[t]his analysis also answers the question whether the Tucker Act impliedly forbids relief under the APA. It does not because it does not cover this situation.").

Similarly, the Tucker Act "does not cover [Respondent's] situation." *Id.* There are several reasons why this is so. *First*, Respondent seeks to enforce rights which arise by operation of law. See *Pearlman*, 371 U.S. at 132,

[26]Under the Federal Court Administration Act of 1992, 28 U.S.C. 1292(d)(4)(A) the United States Court of Appeals for the Federal Circuit was given exclusive jurisdiction of appeals from a district court granting or denying a motion to transfer an action to the Unted States Court of Federal Claims.

n.12 ("[t]he right of subrogation is not founded on contract. It is a creature of equity."); see also *Ormes*, 252 U.S. at 474 (1920); *Armstrong*, 364 U.S. at 46 (liens of federal subcontractors "attached by operation of law"). As such, its claim does not fall within the Tucker Act, since it is not "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491(a)(1).[27]

Respondent's suit, like *Katz*, "is not a contract case." *Katz*, 16 F.3d at 1209. Since Respondent does not have a contract with the United States, it lacks privity of contract, "an indispensable prerequisite for standing to sue in the Court of Federal Claims under the Tucker Act." *National Leased Housing Ass'n v. United States*, 105 F.3d 1423, 1435 (Fed. Cir. 1997); see also *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (privity of contract does not exist between the government and its subcontractors).[28]

Nevertheless, Petitioner states that "If the prime

[27]Respondent does not allege an implied in law contract under the Tucker Act. Thus, the authorities cited at page 49 of Petitioner's Brief are inapposite. Those cases restrict the Tucker Act jurisdiction of Court of Federal Claims (or its predecessor courts) to exclude claims based upon a contract implied in law. They say nothing about the reach of Section 702's waiver of sovereign immunity for claims "other than money damages" in federal district courts.

[28]In any event, the remedy Respondent seeks -- an equitable lien -- is beyond the Court of Federal Claims' jurisdiction which, with exceptions not here applicable is limited to claims for money damages. *United States v. King*, 305 U.S. 1, 4 (1969) ("cases seeking relief other than money damages from the Court of Claims have never been 'within its jurisdiction.' quoting The Declaratory Judgment Act, 28 U.S.C. 2201.)

contractor, which is in privity with the government, cannot enforce its right to payment by seeking 'specific performance' under the APA, it should follow *a fortiori* that a subcontractor, which is not in privity, cannot do so either." Pet. Br. 48-49. That argument, however, misreads the premise for impliedly precluding contractors from APA relief. If aggreived by government action, contractors have a damages remedy in the Court of Federal Claims.[29] As the court stated in *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982), "to allow suit against the United States under the APA in actions actually based on contract would create such inroads into the restrictions of the Tucker Act that it would ultimately result in the demise of the Court of Claims." However, where --as here-- the source of rights is other than contract, district court jurisdiction is proper. *Id.* at 971. ("It is clear to us that Megapulse has not brought a contract action or an otherwise disguised claim for monetary relief. * * * This action was properly brought under the APA, and injunctive relief, preliminary or permanent, is available in the district court."). *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir. 1985) (no Tucker Act implied preclusion of timber contractors' claim based upon extra-contractual statutory obligations).

B. The Miller Act Does Not Impliedly Forbid Enforcement Of An Equitable Lien

Petitioner argues that "[t]o the extent the Tucker Act does not bar relief, the Miller Act does." Pet. Br. 49, n.27. However, that argument has been considered and rejected by at least three circuit courts of appeal. This Court should

[29]An alternative forum is available before agency boards of contract appeals under the Contract Disputes Act of 1978, 41 U.S.C. 601 et seq. Like the Court of Federal Claims, the boards' jurisdiction does not extend to granting general equitable relief.

reject it as well.

In *Active Fire Sprinkler*, the government argued that the incorporation of a Miller Act remedy into the Postal Reorganization Act, 39 U.S.C. 410(b)(4)(B) "evidences Congress's intent that the Miller Act provide the only remedy for subcontractors, laborers and suppliers." *Active Fire Sprinkler*, 811 F.2d at 752. Relying on *Pearlman*, the court rejected that argument, stating "the Miller Act does not evidence an intent to eliminate any rights that subcontractors might possess." *Id.* at 753. That Congress did not impliedly preclude subcontractor rights is apparent in the following language from *Pearlman*:

> It is argued that the Miller Act [footnote omitted] changed the law as declared in the *Prairie Bank* and *Henningsen* cases. We think not. Certainly no language of the Act does, and we have been pointed to no legislative history that indicates such a purpose. The suggestion is, however, that a congressional purpose to repudiate the equitable doctrine of the two cases should be implied from the fact that the Miller Act required a public contract surety to execute two bonds instead of the one formerly required. * * * Neither this slight difference in the new and the old Acts nor any other argument presented persuades us that Congress in passing the Miller Act intended to repudiate equitable principles so deeply imbedded in our commercial practices, our economy, and our law as those spelled out in the *Prairie Bank* and *Henningsen* cases.

Pearlman, 371 U.S. at 139-40 . See also *Wright*, 29 F.3d at 1431 ("[s]ince the plain language of the Miller Act relates only to the creation of a remedy for subcontractors as against sureties, as we construe it, it does not limit [the subcontractor]'s rights vis-a-vis the government herein."). Accord *Kennedy Elec.*, 508 at 957.

Petitioner cites several cases stating that subcontractors cannot sue the government. But those precedents are nothing more than sovereign immunity bars. Because immunity has been waived, those authorities--no matter how extensive or well-settled earlier-- no longer bar federal court jurisdiction.[30]

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[30]This Court's statement in *United States v. Munsey Trust Co.*, 332 U.S. 234, 241 (1947) that "[n]othing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation" should not prevent jurisdiction of this case.

First, irrespective of the state of the law in 1947, Congress in 1976 "eliminate[d] the sovereign immunity defense in *all equitable actions for specific relief* against a Federal agency or officer acting in an official capacity." *Bowen*, 487 U.S. at 898-900, quoting *Maryland Dep't of Human Resources v. HHS*, 763 F.2d 1441, 1444 (D.C. Cir. 1985), quoting in turn H.R. Rep. No. 1656, 94th Cong. , 2d Sess. 9 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976), U.S. Code Cong. & Admin. News 1976, p. 6129. (emphasis in original). As *Bowen* noted, there is a "well-settled presumption that Congress understands the state of existing law when it legislates, see e.g. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 697 (1979)." Bowen, *supra*, at 696. Presumably aware that sovereign immunity barred subcontractor suits, Congress said nothing in Section 702 to exclude such suits from its reach.

Second, in *Pearlman*, Mr. Justice Black took pains to distinguish *Munsey*:

> "The point at issue in that case [*Munsey*] was whether the United States while holding a fund like the one in this case could offset against the contractor a claim bearing no relationship to the contractor's claim there at issue. We held that the Government could exercise the well-established common-law right of debtors to offset claims of their own against their creditors. *This*

Congress, of course, is free to waive sovereign immunity on terms of its choice. And it did so broadly in the 1976 amendment to Section 702. In what this Court termed "an important part of a major piece of legislation," *Bowen*, 487 U.S. at 896. Congress unequivocally eliminated sovereign immunity as a defense in lawsuits against the United States, except for claims seeking "money damages." That Congress has removed the "technical obstacle" of sovereign immunity is beyond dispute. *Id.* This Court should therefore reject

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> *was all we held*. The opinion contained statements which some have interpreted [footnote omitted] as meaning that we were abandoning the established legal and equitable principles of the *Prairie Bank* and *Henningsen* cases under which sureties can indemnify themselves against losses. • • • We hold that *Munsey* left the rule in *Prairie Bank* and *Henningsen* undisturbed."

Pearlman, 371 U.S. at 140-141 (emphasis added).

Third, at least three circuit courts have permitted subcontractors to directly sue the United States Postal Service. See *Wright*, 29 F.3d at 1426; *Active Fire Sprinkler*, 811 F.2d at 752-753; *Kennedy Elec.*, 508 F.2d at 954. If the *Munsey* quote accurately reflected current law, then those decisions would all be in error.

Fourth, *Munsey* cited as its exclusive support three Court of Claims decisions under the Tucker Act. See *H. Herfurth, Jr., Inc., v. United States*, 89 Ct. Cl. 122 (1939); *Schmoll v. United States*, 63 F. Supp. 753, 105 Ct. Cl. 415, 455 (1946); *Maryland Casualty Co. v. United States*, 100 Ct. Cl. 513, 53 F. Supp. 436, 440 (1944). This is not such a such a suit. See *infra*, 37-38.

Finally, whether *Munsey* was correctly decided, even under then-applicable law, has been the subject of debate among scholars. See Am. Br. For the Surety Assoc. of America at 9, n.8 and authorities cited therein.

Petitioner's argument to construe Section 702 narrowly. See *Block v. North Dakota*, 461 U.S. 273, 293-294 (1983) (O'Connor, J., dissenting) ("[a]lthough it is indeed true that the Court construes waivers of sovereign immunity strictly, that principle of statutory construction is no more than an aid in the task of determining congressional intent. In a close case, it may help the Court choose between two equally plausible constructions. It cannot, however, grant the Court authority to narrow judicially the waiver that Congress intended.") See also *United States v. Kubrick*, 444 U.S. 111, 118 (1979); *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) ("[o]f course, when dealing with a statute [the FTCA] subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.").

IV. CONCLUSION

For the foregoing reasons, and those stated in its Brief in Opposition, Respondent respectfully requests that this Court affirm the judgment below.

Respectfully submitted,

THOMAS F. SPAULDING
Counsel of Record
DAVID A. WEBSTER
SPAULDING, COX & SCHAEFFER, LLP
Attorneys for Respondent
1205 N.W. 25th Avenue
Portland, Oregon 97210-2497
(503) 222-3815

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No. 97-1642

In the Supreme Court of the United States

OCTOBER TERM, 1998

THE UNITED STATES DEPARTMENT OF THE ARMY,
PETITIONER

v.

BLUE FOX, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

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THE UNITED STATES DEPARTMENT OF THE ARMY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that this Court has uniformly rejected attempts to impose new financial obligations on the Treasury except as Congress by law expressly authorizes (see Gov't Br. 17-23), and that this Court repeatedly has held that subcontractors on government projects have no direct claim against the government (see Gov't Br. 23-28). Respondent, however, argues that the 1976 amendment to the Administrative Procedure Act— which inserted a partial waiver of sovereign immunity into 5 U.S.C. 702— altered those settled principles and opened the Treasury to new (and potentially limitless) non-statutory payment obligations, so long as the relief can be characterized as "equitable" in nature.

Respondent's theory cannot be reconciled with the fundamental principle that money from the Treasury is not something to which anyone is entitled absent an Act of Congress creating that right. It thus conflicts with Section 702's exclusion of "money damages," which bars recovery of money from the Treasury unless public funds were "the very thing" to which the claimant "was entitled" from the government in the first instance, *Bowen* v. *Massachusetts*, 487 U.S.

879, 895, 900 (1988), and with Section 702's preservation of the "duty of the court to * * * deny relief on any other appropriate legal or equitable ground." It ignores Section 702's limitation on the waiver of immunity to suits for "judicial review" of "agency action." And it disregards the effect of other statutes—the Tucker Act and the Miller Act—that impliedly forbid the monetary relief respondent seeks.

I. SECTION 702 EXCLUDES RESPONDENT'S SUIT FROM THE SCOPE OF THE IMMUNITY WAIVER

A. The waiver of sovereign immunity in 5 U.S.C. 702 excludes suits seeking "money damages." Respondent does not dispute that, under *Bowen*, monetary relief constitutes "money damages" within the meaning of Section 702 unless money from the Treasury was "the very thing" to which the claimant "was entitled" from the government in the first place. 487 U.S. at 895, 900 (quotation marks omitted); Gov't Br. 14-16.

Respondent contends (Br. 10), however, that general principles of equity "entitled" it to money from the Treasury. Even setting aside the fact that the equities hardly favor respondent,[1] the allegedly "well-established equitable rights

[1] While respondent blames the Army for failing to require Verdan to post a payment bond, respondent ignores the fact that *it* could have asked Verdan to prove that it had posted a bond, yet failed to do so. Gov't Br. 4. Respondent likewise blames the Army for paying Verdan after respondent complained of partial non-payment. When the Army investigated Verdan's missed payment, however, Verdan advised that it would pay respondent promptly. J.A. 27. Nor was it clear that withholding money from Verdan would have benefitted respondent: "It is hardly reasonable to withhold money in order to assure payments which perhaps can be made only from the money earned." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 243 (1947). Besides, respondent could have protected its own rights (without involving the Army) by bringing its equitable lien claim against Verdan—the contractor that owed it money—and demanding immediate payment or an injunction against dissipation. Respondent, however, did no such thing. Finally, while respondent accuses the Army of "conscious avoidance" of Miller Act bonding requirements, Resp. Br. 3, respondent ignores the genuine debate within the Army as to whether the contract as a whole was for services rather than construction and thus exempt from the bonding requirement. J.A. 44, 52.

of subcontractors to impose liens upon prime contract funds" (*ibid.*) cannot create an entitlement to public funds in the Treasury. Only an Act of Congress can do that. See U.S. Const. Art. I, § 9, Cl. 7; Gov't Br. 16-23; *OPM* v. *Richmond*, 496 U.S. 414, 416, 424, 432 (1990); *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846) (money in Treasury cannot be garnished by creditors of payees without statutory consent); *Knote* v. *United States*, 95 U.S. 149, 154 (1877); *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 94 (1992).

As a result, respondent's discussion (Br. 12-16) of the origins of equitable liens is irrelevant. Money from the Treasury cannot be "the very thing" to which *anyone* is "entitled" unless an Act of Congress creates a payment obligation or authorizes its creation; judge-made principles of equity are insufficient. See, *e.g.*, *Richmond*, 496 U.S. at 426 ("equitable estoppel" is not "a basis for money claims against the Government"). In this case, respondent and its amici can identify no Act of Congress that obligates the United States to pay subcontractors when the prime contractor does not, or that licenses courts to impose such an obligation as a matter of common law or equity. Consequently, this suit must be dismissed as an action for money damages. *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1266-1267 (3d Cir. 1994) (action is for "specific relief" only if it seeks "funds to which a statute allegedly entitles" the plaintiff); *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 536 (D.C. Cir. 1992) ("*Bowen*'s holding * * * does nothing for [plaintiff's] cause" because the plaintiff's "basic claim is not for enforcement of any legal mandate that the EPA pay him a sum of money.").

B. Respondent attempts to circumvent that result in three ways. None succeeds.

1. Respondent admits that *Richmond* and its predecessors reject the imposition of money-payment obligations on the Treasury based on equity alone, but contends that those cases apply only where an Act of Congress affirmatively prohibits the payment the plaintiff seeks. Resp. Br. 26-27. That argument sets the Appropriations Clause on its head: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976). The argument is also foreclosed by *Richmond*'s central holding, which is that "payments of money from the Federal Treasury are limited to those authorized by statute." 496 U.S. at 416.[2] Nor does it distinguish *Richmond*'s predecessors, *Buchanan*, *Knote*, and *Republic National Bank*. In none of those cases was there a statute prohibiting disbursement; yet in each this Court recognized that no right to public money in the Treasury could arise except as provided by an Act of Congress. *Buchanan*, 45 U.S. (4 How.) at 20; *Knote*, 95 U.S. at 154; *Republic Nat'l Bank*, 506 U.S. at 94.[3]

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[2] Respondent also seeks to distinguish *Richmond* on the ground that the primary case relied on there—*United States* v. *Testan*, 424 U.S. 392 (1976)—was a money damages action in the Court of Claims. Resp. Br. 29. But *Richmond* was not a Court of Claims case; it was (as respondent claims this suit is) an action for judicial review of agency action—OPM's refusal to award the claimant a disability annunity. See p. 8, *infra*. In any event, the fact that the principle first was articulated in cases brought in the Court of Claims—the specialized court where most non-tort monetary claims against the United States had to be heard—is immaterial, for the principle applies regardless of where suit is brought.

[3] Nor does it matter that additional funds have been appropriated to the Army for its operations and maintenance. Even where Congress has appropriated money to an agency (or created a fund for the payment of judgments), the Appropriations Clause bars courts from disbursing that money in the agency's stead except "on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Richmond*, 496 U.S. at 432. Indeed, in *Buchanan*, 45 U.S. (4 How.) at 20, the money had been appropriated and was actually in the

2. To the extent respondent argues (Br. 11) that this Court has already declared that subcontractors can obtain equitable liens against the United States with respect to public funds, respondent errs. This Court repeatedly has rejected such claims. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947) ("[N]othing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation."); *Equitable Sur. Co.* v. *McMillan*, 234 U.S. 448, 455 (1914) (liens permissible on private property not "permissible in the case of a Government work"); *J.W. Bateson Co.* v. *United States*, 434 U.S. 586, 589 (1978) (liens "cannot attach to Government property"); Gov't Br. 36-37 (citing additional cases).

Moreover, as explained in our opening brief (at 36-40), the cases respondent and its amici cite for the contrary proposition—*Prairie State Bank* v. *United States*, 164 U.S. 227 (1896), *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U.S. 404 (1908), and *Pearlman* v. *Reliance Insurance Co.*, 371 U.S. 132 (1962)—did not involve claims for funds vis-à-vis the United States itself. Rather, they concerned the competing claims of private parties on funds the United States had removed from the Treasury and as to which it had disclaimed any right or interest. Gov't Br. 36-40. As a result, those cases establish only that equitable doctrines may govern the relative priority of private claimants with respect to money, not in the Treasury, in which the United States has no interest. They cannot be read as holding that equitable doctrines alone can give subcontractors rights in public funds vis-à-vis the United States itself, or as overruling, *sub silentio*, the established principle that no

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hands of the Navy purser for payment to sailors; this Court held that the Appropriations Clause barred the attempt to garnish it nonetheless. See also *McCarty* v. *McCarty*, 453 U.S. 210, 229 n.23 (1981) (noting that doctrine of non-attachability of government funds established in *Buchanan* rests on the Appropriations Clause rather than sovereign immunity).

right to public funds in the Treasury may arise except as Congress by statute directs. Those issues were not before the Court. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (decision binding precedent only as to issues "squarely addressed"). When such equitable claims to public funds have been squarely presented, this Court has rejected them. See, *e.g.*, *Richmond*, *supra*.

Amicus Surety Association of America is thus mistaken to read *Pearlman* as holding that sureties can, through "subrogation," assert the rights of unpaid subcontractors against the United States; it likewise errs in concluding that subcontractors themselves must therefore have such rights against the United States. Surety Ass'n Br. 10-12. Because *Pearlman* involved "a dispute between the trustee in bankruptcy of a government contractor and the contractor's payment bond surety," 371 U.S. at 133, over funds in which the United States had no interest and had "turned over to the bankrupt's trustee," *id.* at 134, it did not address whether naked principles of equity could (consistent with the Appropriations Clause) afford sureties or subcontractors a right to funds in the Treasury as against the United States itself. Instead, to the extent *Pearlman* (like its predecessors) addresses the relative priority of subcontractor and surety claims by reference to their "equitable rights," the rights it recognizes are with respect to the claims of other private parties, which operate only once the United States has disclaimed any interest in, and parted with, the disputed funds. See 371 U.S. at 136 (resolution of case depends only on whether surety's "right" was "prior" to the bankrupt contractor's); see also Gov't Br. 38-40; *United States Fidelity & Guar. Co.* v. *United States*, 475 F.2d 1377, 1382 (Ct. Cl. 1973) (rights recognized in *Pearlman* and predecessors are rights

"vis-à-vis other claimants to the money" but not as against "the Government").[4]

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[4] Respondent's assertion that *Henningson* "specifically noted that the government had 'equitable obligations to see that the laborers and supplymen were paid'" (Resp. Br. 10-11) misreads that case. *Henningson*, like the other cases, involved a dispute between private parties over funds that were outside the Treasury. Gov't Br. 38-39 & nn. 18-19. Moreover, the passage from which respondent quotes—which states that the surety's payment on the bond had "released the Government from all equitable obligations to see that laborers and supplymen were paid," 208 U.S. at 410—did not suggest that laborers and suppliers (or, therefore, the surety through subrogation) had a judicially enforceable right to money from the United States. *Munsey*, and the longstanding rule it embodies (see Gov't Br. 23-28), refute that proposition. And while the quoted passage from *Henningson* may describe what the government ought to do with retained funds where (unlike here) it does not need the funds to complete the contract—and therefore describes an obligation that is "equitable" in a non-technical sense (*i.e.*, a moral obligation)—it in any event refers to an obligation to see that laborers and suppliers are paid, not an enforceable obligation of the United States to pay them itself.

Respondent's further assertion that *Houston* v. *Ormes*, 252 U.S. 469, 474 (1920), and *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121 (1924), recognize the right of private parties to encumber public funds through equitable liens, see Resp. Br. 20 n.4, is incorrect. Those cases (like the rest) hold only that private parties can obtain equitable rights with respect to the claims of other private entities. *Houston*, 252 U.S. at 473 (plaintiff had "an equitable right in the fund *as against Sanders* [the other private party]" (emphasis added)); *Mellon*, 266 U.S. at 124 (dispute between the Limited Company and Orinoco over rights in certificate). Besides, in those cases the money had been specifically appropriated to create a separate fund to pay claims; the government did not assert a proprietary or possessory right to the fund; and payment was a mere "ministerial duty." *Houston*, 252 U.S. at 473; *Mellon*, 266 U.S. at 125; see *Schmitz* v. *Societe Internationale*, 249 F. Supp. 757, 762 (D.D.C. 1966) (*Mellon* and *Houston* do not apply unless "Treasury officials [are] charged with the performance of no duty other than the ministerial duty of making disbursement of the fund," and "the fund [is] an especially earmarked account * * * and the United States [has] no claim or interest in the fund."), cert. denied, 387 U.S. 908 (1967); *Stitzell Weller Distillery* v. *Wallace*, 30 F. Supp. 1010, 1014 (D.D.C. 1940) (similar). Nor do those cases address remedies against the United States after the funds are paid to another private party, as occurred here.

3. Relying on decisions interpreting the Postal Service's sue-and-be-sued clause, 39 U.S.C. 401, respondent argues (Br. 11-12) that Section 702's limited waiver of immunity eliminates any barrier to "equitable lien" suits and the creation of other "equitable" rights to public funds. See also Surety Ass'n Br. 13-14; Amer. Subcontractors Br. 14-15.

a. This Court already has rejected the theory that a waiver of immunity can, by itself, give rise to monetary liability against the United States. See *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (government instrumentality not liable unless there is both a "waiver of sovereign immunity" and a "source of substantive law" applicable to the government that "provides an avenue for relief"). Indeed, *Richmond* demonstrates that point. There, the statute governing review—like Section 702 here—partially waived the immunity of the United States to suits for "judicial review," permitting the agency to be named as defendant. 496 U.S. at 418; 5 U.S.C. 7703(a)(1), (2). There, the claimant—like respondent here—asserted a right to federal funds under an equitable theory that Congress had not authorized by statute. 496 U.S. at 416. And there the Court held that, despite the waiver of immunity, equity alone could not create a substantive entitlement to money in the Treasury, because Congress had not conferred such a right by statute. *Id.* at 416, 424, 426, 432. That very holding disposes of respondent's claim that, given the partial waiver in Section 702, judge-made principles of equity can create an entitlement to public money in the Treasury here.

See pp. 13-14, *infra*. Respondent's reliance (Br. 20 n.4) on *United States* v. *Alabama*, 313 U.S. 274 (1941), and *Armstrong* v. *United States*, 364 U.S. 40 (1960), is also misplaced. Those cases merely hold that, when the United States acquires property that is already encumbered, its rights are subject to that encumbrance. Nowhere do they hold that unencumbered public money, already held in fee simple by the United States, can become encumbered by "operation of law" where no Act of Congress so provides.

Nor can respondent's argument be reconciled with the legislative history of the 1976 amendment to Section 702. As explained in our opening brief (at 35-36), it was uniformly understood that the waiver of immunity would not necessitate additional "appropriation[s] of funds," S. Rep. No. 996, 94th Cong., 2d Sess. 19 (1976). Indeed, the drafters of the 1976 amendment assured Congress that "[t]he monetary liability of the United States is left totally unchanged," *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 50 (1970) (*Senate Hearing*), and reassured Congress that the United States' historic immunity to garnishment actions had been preserved as well, *id.* at 134. Under respondent's view, however, the 1976 amendment to Section 702 broadly expanded the government's liability, subjecting the Treasury to money-payment obligations in equity—including "equitable liens," and "restitution," see Resp. Br. 10, 15—whenever the relief can be characterized as "equitable" and "specific." See *id.* at 15-16.

b. For similar reasons, the court of appeals decisions involving the Postal Service's sue-and-be-sued clause, cited by respondent and its amici,[5] do not assist them. In *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 520 (1984), this Court explained that the Postal Service's sue-and-be-sued clause, 39 U.S.C. 401, does not merely waive the Postal Service's immunity, but also "launche[s] the Postal Service into the commercial world" and makes its "liability"

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[5] See Resp. Br. 11-12 (citing *Active Fire Sprinkler Corp.* v. *United States Postal Serv.*, 811 F.2d 747, 756 (2d Cir. 1987); *Kennedy Elec. Co.* v. *United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974); *Wright* v. *United States Postal Serv.*, 29 F.3d 1426 (9th Cir. 1994)); Surety Ass'n Br. 13-14 (same cases); Amer. Subcontractors Br. 14-15 (same cases). The Subcontractors also cite two non-Postal Service cases—*Trans-Bay Engineers & Builders, Inc.* v. *Hills*, 551 F.2d 370 (D.C. Cir. 1976), and *Bor-Son Building Corp.* v. *Heller*, 572 F.2d 174 (8th Cir. 1978)—but those cases too involve the construction of a sue-and-be-sued clause.

in commercial matters largely "the same as that of any other business." Following that decision and its predecessor, *FHA* v. *Burr*, 309 U.S. 242 (1940), lower courts have sometimes concluded that 39 U.S.C. 401 authorizes them to impose liability on the Postal Service under equitable or common law theories (without regard to the Service's governmental character) as if the Service were "any other business." See *United Elec. Corp.* v. *United States*, 647 F.2d 1082, 1084 (Ct. Cl.) (some courts of appeals read the "broad, unlimited legislative declaration that the Postal Service could 'be sued'" as leaving them "free to apply doctrines applicable to private persons, including principles of restitution * * * to conclude that the equities of [a] subcontractor [a]re paramount to those of the [Postal Service]"), cert. denied, 454 U.S. 863 (1981).

Even if we assume, *arguendo*, that those lower court decisions are correct, Section 702 does not evince a similar intent to launch each and every federal agency "into the commercial world," or to subject the Treasury to monetary liability under judge-made equitable doctrines like "any other business." To the contrary, as pointed out in our opening brief (at 20-21, 32-33), the 1976 amendment to Section 702 was "purely procedural in nature," S. Rep. No. 996, *supra*, at 19, and avoided recognizing *any* source of substantive law—equitable or otherwise—as a basis for imposing new monetary liability against the United States. Gov't Br. 20-21, 33 n.14 (contrasting text of Section 702 with Tucker Act, Federal Tort Claims Act, and 39 U.S.C. 401); pp. 8-9, *supra*; see also *Furlong* v. *Shalala*, 156 F.3d 384, 394 (2d Cir. 1998) ("The APA is merely a procedural vehicle for review of agency action; it does not confer a substantive right" or "property interest."); *Stockman* v. *FEC*, 138 F.3d 144, 152 n.14 (5th Cir. 1998) (APA does "not declare self-actuating substantive rights, but rather, . . . merely provide[s] a vehicle for enforcing rights which are declared elsewhere" (internal quotation marks omitted)).

Because Section 702 does not itself impose substantive money-payment obligations on the United States (or license courts to create them), any plaintiff seeking public funds under Section 702 must locate a right to that money in the text of some other federal statute. *United States* v. *Mitchell*, 463 U.S. 206, 216-217 (1983) (where statute "does not create any substantive right enforceable against the United States," the "substantive right must be found in some other source of law" (internal quotation marks omitted)); *Testan*, 424 U.S. at 398; *Richmond*, 496 U.S. at 416, 424, 432. In *Bowen*, the plaintiff could locate such a statute, because its monetary claim was predicated on the Medicaid Act's declaration that "the Secretary * * * *shall pay* to each State" certain appropriated sums. 42 U.S.C. 1396b(a) (emphasis added); see 487 U.S. at 900 ("suit seek[s] to enforce the statutory mandate itself, which happens to be one for the payment of money"). Respondent, in contrast, effectively concedes that it cannot identify any statute entitling it to public funds. Consequently, the money respondent seeks from the Treasury is not something (much less the "very thing") to which respondent was entitled from the government, 487 U.S. at 895,[6] and its claim was properly dismissed

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[6] The American Subcontractors Association contends that a statutory right to compensation is not necessary because the Federal Circuit permits sureties—but not subcontractors—to sue the United States under the Tucker Act for retained contract funds. See Subcontractors Br. 17 (citing *National Surety Corp.* v. *United States*, 118 F.3d 1542 (Fed. Cir. 1997)). As explained in our opening brief, however, that decision (and others like it) do not hold that naked principles of equity, by themselves, can give rise to governmental payment obligations. Instead, they premise liability on the (sometimes strained) notion that the right of sureties to claim retained contract funds from the United States is based on contract; the Tucker Act, of course, expressly recognizes contract claims as a basis for monetary relief. See Gov't Br. 40 n.20; see also *Admiralty Constr.* v. *Dalton*, 156 F.3d 1217, 1222 (Fed. Cir. 1998) (subrogation sometimes "entitles sureties to succeed to the contractual rights of the [prime] contractor against the government"); *Balboa Ins. Co.* v. *United States*, 775 F.2d

by the district court as a prohibited action for money damages.

1158, 1160 (Fed. Cir. 1985) (surety "is as much a party to the Government contract as the contractor"); *National Surety*, 118 F.3d at 1547 (surety is beneficiary of government retainage clause); *Transamerica Premier Ins. Co.* v. *United States*, 32 Fed. Cl. 308, 312 (1994) ("[A] surety that has paid materialmen's claims can come directly against the Government" because "the surety is subrogated * * * to the right of the contractor to use these funds in the event he has paid his materialmen."). Setting aside the flaws in that reasoning, see Gov't Br. 40 n.20, it does not help respondent, since respondent disclaims any contract rights against the Army, and could assert such rights only in the Court of Federal Claims in any event, see pp. 18-19, *infra*.

For similar reasons, Tucker Act and Government Accounting Office opinions stating that the government may voluntarily pay an unpaid subcontractor with retained contract funds *owed to the prime contractor*, Resp. Br. 26-28, do not advance respondent's cause. Those opinions all address situations in which the government retained a set percentage of contract funds to ensure a performance that was ultimately completed, but (for reasons unrelated to performance) the funds were not turned over to the prime contractor. See, *e.g.*, *In re Naval Facilities Eng'g Command*, 57 Comp. Gen. 176, 178 (1977); *In re United States Coast Guard—Payment of Contract Retainages to Subcontractors*, No. B-218813, 1986 WL 63364 (Comp. Gen. Apr. 9, 1986). Because the money was owed to the prime contractors under the contracts, the GAO (following Federal Circuit precedent) allowed government agencies to satisfy their enforceable contract obligations by depositing the funds with a court and filing an interpleader; the court then determined who had the superior right to the funds. 57 Comp. Gen. at 178; 1986 WL 63364, at *2. Because the Army does not owe money to anyone under the contract in this case, those decisions do not help respondent; the Army is permitted to pay money out to satisfy its contract obligations, but it is not permitted to give out federal funds *gratis*. Indeed, the decisions upon which respondent relies expressly *bar* payment in the present circumstances, as they reject any notion that a subcontractor can receive public funds that have not been earned by, and are not owed under contract to, its prime contractor. 57 Comp. Gen. at 178 (funds that were "not earned by the defaulted contractor" cannot be paid out; only "money earned by the [prime] contractor but retained by the Government to assure contract performance" may be interpleaded).

C. The 1976 amendment to Section 702 not only expressly bars claims for "money damages," but also declares that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of courts to deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. As explained in our opening brief (at 32-33), the established rule that equity cannot by itself impose money-payment obligations on the Treasury constitutes precisely such a "limitation" on judicial review and a "legal or equitable ground" for "deny[ing]" monetary "relief." See *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 244-245 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (fact that substantive source of law relied upon does not apply to the United States or "expose" its "instrumentalities to liability" is grounds for dismissal under Section 702), cert. denied, 455 U.S. 919 (1982). For that reason as well, respondent is incorrect to assert (Br. 29-31) that the requirement of a statutory right to payment is an improper, extra-textual barrier to monetary relief.

D. That respondent seeks "money damages" is made especially clear by the fact that the specific fund to which respondent claims entitlement has been dissipated. See Gov't Br. 30-31 n.13. Thus, while respondent argues that equitable liens historically were thought of as "specific relief" because they create a right to a specific fund, Resp. Br. 13-18, that description does not fit cases where, as here, the specific fund to which the lien allegedly attached has ceased to exist. In such circumstances, the money the plaintiff seeks is a substitute for the very thing to which it was allegedly entitled, and is barred under Section 702 as money damages. See *Bowen*, 487 U.S. at 895; *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994).

That cases under the Tucker Act (Resp. Br. 18-19; Surety Ass'n Br. 19-21) and under the Postal Service's sue-and-be-sued clause (Resp. Br. 20-21) have permitted recovery despite dissipation of the fund changes nothing. If the fund no longer exists, then the monetary relief sought ceases to be

"specific relief" and constitutes "money damages" under *Bowen*, see *City of Houston*, *supra*, and at common law as well, see Restatement (First) of Restitution and Unjust Enrichment § 215, at 204 (proposed final draft, Mar. 4, 1936) (where property is dissipated, claimant cannot enforce lien or trust but instead "has only a personal claim against the wrongdoer"); *id.* § 161, at 20 (similar). Indeed, the fact that respondent and its amici rely on Tucker Act cases confirms that such an award constitutes damages, since the Tucker Act largely precludes equitable relief. See Gov't Br. 47-48.[7]

[7] Respondent's protest (Br. 21-23) that the Army dissipated the funds after respondent filed its suit and prayed for (but did not move for) an injunction against dissipation, is factually and legally without merit. The Army paid Verdan the money to which respondent claims entitlement long before respondent filed suit. Resp. Br. 1-2 (Verdan was paid between July and October of 1994; action was filed in April of 1995). And while the Army paid the replacement prime contractor, Dynamic, after respondent brought suit, respondent could not—even if the equitable lien doctrine applied—have any conceivable basis for demanding that money. A subcontractor's equitable lien can attach only to funds actually earned by its prime contractor and owed to the prime contractor under the contract. 3 D. Dobbs, *The Law of Remedies* 470 (1993) (subcontractor can enforce its claim only "against any funds still held by the landowner * * * which are owed to the general contractor"); 57 Comp. Gen. at 178 (no claim in equity for "the contract amount that was not earned by the defaulted [prime] contractor"); *United States* v. *MacDonald Constr. Co.*, 295 F. Supp. 1363, 1366 (E.D. Mo. 1968) ("This equitable lien, however, only extends to funds in the hands of the [debtor] which it has determined are due and payable to the prime contractor under the terms of the prime contract."); *Morgan* v. *Goodwin*, 355 So.2d 217, 219 (Fla. Dist. Ct. App. 1978); *C.T. Willard Co.* v. *City of New York*, 142 N.Y.S. 11, 24 (Sup. Ct. 1913). Respondent nowhere alleges that the money paid to Dynamic, which was for work that Verdan never did, was owed to Verdan. To the contrary, the district court specifically found that the money paid to Dynamic corresponded to work that Verdan never completed. Pet. App. 23a; see also J.A. 60, 61.

II. RESPONDENT'S CLAIM DOES NOT SEEK "JUDICIAL REVIEW" OF "AGENCY ACTION"

Respondent's "equitable lien" claim falls outside the scope of the waiver of immunity in Section 702 for the further reason that it is not a suit for "judicial review" of "agency action." See Gov't Br. 42-43. In fact, respondent's suit is precisely the sort of non-"review" commercial claim that placement of the waiver into the Administrative Procedure Act was meant to bar. See *id.* at 43-44.

A. Respondent asserts that the waiver of immunity in Section 702 is not limited to suits for "judicial review" of "agency action," and instead extends to "*all* non-damages actions seeking relief from official misconduct." Resp. Br. 35-36. But the very fact that the waiver appears in Section 702, the APA provision providing for "judicial review" of "agency action," refutes respondent's contention. Gov't Br. 42. Indeed, respondent does not dispute that Congress (and the 1976 amendment's drafters) repeatedly noted that the waiver was placed in Section 702 for the specific purpose of ensuring that it would apply only where Section 702 applies. Gov't Br. 42-43. Insofar as respondent claims that Section 702 permits suits other than those for "judicial review" of "agency action," its argument can be reconciled with neither the statutory text nor *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 882 (1990) (stating that anyone "claiming a right to sue [under Section 702] must identify some 'agency action' that affects him in the specified fashion," and that "it is judicial review 'thereof' to which he is entitled"). See Gov't Br. 45-46.

B. Respondent does not deny that its suit is framed as a commercial claim for money rather than judicial review of agency action. Gov't Br. 44-45. Nonetheless, respondent asserts that its equitable lien claim in substance seeks "review" of the Army's "action" of "continu[ing] payment of contract funds ($86,132.33) to Verdan," and the payment of

"$84,910.53 to [Dynamic]." Resp. Br. 34. If the supposed obligation to withhold payments from Verdan and Dynamic was the duty the Army allegedly breached and that is now subject to judicial review, however, then the only specific relief respondent can claim is an order requiring the Army to withhold the funds. Respondent, however, does not ask for such an order (and the funds already have been paid out).[8] Instead, respondent demands a cash payment for itself. Because that remedy would not require the Army to give respondent the very thing to which it claims it was entitled, and would instead give respondent money in compensation for the loss it suffered when Verdan failed to pay respondent, it constitutes the sort of "substitute" monetary remedy that Section 702 and *Bowen* bar as "money damages." See *Bowen*, 487 U.S. at 893.

The argument also fundamentally fails to explain how respondent's "equitable lien" theory can be reconciled with the waiver's limitation to "action[s] in * * * court" for "judicial review" of "agency action," 5 U.S.C. 702. See Gov't Br. 36. Respondent does not dispute that, under its theory, an equitable lien was levied on public money in the Treasury once respondent advised the Army that the prime contractor, Verdan, had not paid it. Even if we were to assume (incorrectly) that a suit to foreclose on such a lien could be construed as "an action in * * * court" for "judicial review" of "agency action," nothing in Section 702 waives immunity to permit the automatic imposition of a lien on United States Treasury funds in the first instance. Imposing a lien on government funds is not "an action in * * * court." It is not

[8] Because a subcontractor has no enforceable rights against the United States, respondent would not in any event have standing to sue to require the Army to withhold (or recover) funds from Verdan or Dynamic, because that relief would not result in payment to respondent to redress its injury. See, *e.g.*, *Federal Election Comm'n* v. *Akins*, 118 S. Ct. 1777, 1783 (1998).

a suit for "judicial review." And it does not pass on "agency action." See Gov't Br. 46.[9]

III. THE RELIEF RESPONDENT SEEKS IS IMPLIEDLY FORBIDDEN BY OTHER STATUTES

Federal courts lack "authority to grant relief" under the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702. In this case, the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, bars the remedy respondent seeks by prohibiting equitable relief in contract actions against the United States and by precluding relief on implied-in-law payment claims like that asserted by respondent. Gov't Br. 47-50.

[9] Respondent's claim (Br. 33) that this argument was not raised before the Ninth Circuit is without merit. Because the Army argued in the Ninth Circuit that this suit is outside Section 702's waiver (see C.A. Br. 9), the Army may "make any argument in support of that claim" in this Court, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); "parties are not limited to the precise arguments they made below." *Ibid.* Moreover, because the issue is sovereign immunity, even a complete failure to raise the issue below would not bar its assertion here. See, *e.g.*, *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887). As this Court has explained, sovereign immunity is sufficiently "jurisdictional in nature," *Meyer*, 510 U.S. at 475, that the issue itself—and thus *a fortiori* particular arguments in support thereof—can be raised for the first time on appeal. *Finn*, 123 U.S. at 232; cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal" (internal quotation marks omitted)). Respondent's further claim that the argument is not within the question presented also lacks merit. The question presented asks whether 5 U.S.C. 702 permits the assertion of an "equitable lien" against the government. See Pet. i. If such a claim falls outside the waiver of immunity in Section 702 because it does not seek judicial review of agency action, the answer to that question is "no." Moreover, the issue was identified in the certiorari petition. See Pet. 20-21 (whether relief is money damages is linked to the nature of "agency action" under review); Pet. Reply Br. 9 n.7 (action not for "judicial review").

A. Seeking to overturn the unanimous agreement of the courts of appeals (see Gov't Br. 48 n.25), amicus Chamber of Commerce denies (Br. 16) that the Tucker Act impliedly forbids equitable relief in contract suits. The unavailability of such relief, it argues, is a coincidence flowing from the fact that the Tucker Act designates the Court of Federal Claims—which largely lacks authority to give equitable relief—as the forum for most contract claims. Congress, however, is presumed to know the legal framework within which it acts. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). When it vests jurisdiction over certain causes of action (contract suits) in a court that lacks authority to grant equitable relief, the natural conclusion is that Congress intended such relief to be barred. In fact, this Court has drawn precisely that conclusion, holding that district courts, which have concurrent jurisdiction over Tucker Act claims for less than $10,000, are also barred from affording equitable relief on contract claims against the United States. *Richardson* v. *Morris*, 409 U.S. 464, 465-466 (1973) (per curiam); see also *United States* v. *Jones*, 131 U.S. 1, 17-19 (1889).

To the extent there could be any doubt as to whether the Tucker Act "impliedly forbids" equitable relief on contract claims within the meaning of Section 702, the legislative history of the 1976 amendment dispels it. As one of the drafters of the amendment explained: "You cannot get specific performance of a Government contract; injunctive and declaratory relief are unavailable. * * * The bill makes it entirely clear that this situation is not affected in the slightest. * * * [T]he Tucker Act is in fact an act consenting to suit which impliedly forbids injunctive and declaratory relief." *Senate Hearing*, *supra*, at 50 (Prof. Cramton). Although that statement and many others like it—made in both Committee Reports and hearings—are cited

and quoted in our opening brief (at 48-49 n.26), the Chamber of Commerce ignores them.[10]

B. Respondent argues, however, that the Tucker Act does not bar its equitable lien action because the Tucker Act does not "consent" to "equitable lien" suits. Resp. Br. 37-38 (quoting *Katz* v. *Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994)). Nothing in the "impliedly forbids" proviso, however, limits its application to statutes that consent to the particular action the plaintiff seeks to assert. To the contrary, if the statute consents to suit for the general subject matter of the plaintiff's suit, but bars the relief the plaintiff seeks, the relief is "impliedly forbid[den]" within the meaning of Section 702. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 286 n.22 (1983) (if suit is untimely under "[an]other statute," that statute forbids relief under Section 702).

Respondent's alternative argument—that its claim does not fall within the subject matter of the Tucker Act because it is not a contract claim, Resp. Br. 38-39—fares no better. Respondent's claim necessarily is based on contract: As the court of appeals recognized, absent Verdan's contract with the Army (and respondent's contract with Verdan), respondent would have no claim at all. See Pet. App. 7a (respondent seeks "the very thing to which it is entitled under the contract"). Respondent, moreover, characterizes its action as a suit for "restitution," "unjust enrichment," or satisfac-

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[10] Nor does this Court's reference in *Bowen* to equitable relief on contracts (Chamber of Commerce Br. 18-19) support the Chamber's view. *Bowen* was not a contract case; and it did not address the "impliedly forbid[s]" language of Section 702. The *Bowen* passage merely gives an example of the sort of remedy that, in private contract actions, may be considered "specific relief" rather than damages. 487 U.S. at 895. It thus can hardly be read to suggest that such relief is not impliedly precluded by the Tucker Act. Indeed, the language upon which the Chamber relies is a quotation from an opinion of the D.C. Circuit, which has long recognized that the Tucker Act "impliedly forbid[s]" equitable relief in contract actions. *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.).

tion of a payment obligation arising "by operation of law." See Resp. Br. 13-16, 38-39. Those characterizations are merely alternative formulations for implied-in-law contracts—obligations that arise not because a party has agreed to be bound, but rather from the perception that the party ought to be bound. Gov't Br. 49. Because the Tucker Act bars such suits, and permits suits only on express and implied-in-fact contracts, *Hercules, Inc.* v. *United States*, 516 U.S. 417, 423-424 (1996), respondent's demand for monetary relief on those claims is "impliedly forbid[den]" under the APA.[11]

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1998

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[11] Contrary to respondent's assertion (Br. 39-43), *Pearlman* did not reject the argument that the Miller Act "impliedly forbids" subcontractor equitable lien actions. See Gov't Br. 49-50, n.27. That case addressed neither the "impliedly forbids" language of Section 702 nor the ability of subcontractors to assert claims directly against the government. Instead, it held that the Miller Act does not affect the rights of sureties to seek money from other private parties through subrogation. 371 U.S. at 139-140; see pp. 5-7, *supra*. Thus, it nowhere addressed whether the Miller Act, because it provides subcontractors with a special cause of action (in the name of the government) on the payment bond, impliedly precludes subcontractors from seeking other remedies *against* the government.

(5)

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No. 97-1642

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
PETITIONER,

v.

BLUE FOX, INC.
RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE SURETY ASSOCIATION OF AMERICA IN SUPPORT OF NEITHER PARTY

EDWARD G. GALLAGHER
(Counsel of Record)
Wickwire Gavin, P.C.
8100 Boone Boulevard, Suite 700
Vienna, VA 22182-7732
(703) 790-8750

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Surety Association of America[1] is an unincorporated association of over 600 companies authorized to write fidelity or surety insurance in the United States. The sureties on almost all performance and payment bonds furnished to the United States to meet the requirements of the Miller Act, 40 U.S.C. § 270a, *et seq.*, are members of the Surety Association.

If the Department of the Army had complied with the Miller Act and required the prime contractor, Verdan Technology, Inc. ("Verdan") to provide a payment bond, the surety on that bond would have paid Blue Fox and been subrogated to Blue Fox's right to contract funds. In the vast majority of cases it is the surety, rather than an unpaid subcontractor, which claims the contract funds in competition with the defaulting prime contractor.

Existing law under the Tucker Act, 28 U.S.C. § 1491 (1996) allows suit by the payment bond surety in such circumstances,[2] but the paying surety's substantive rights are grounded in part on the equitable rights of the subcontractors whom the surety paid. Sureties, therefore, have a keen interest in the portions of this case which involve the existence and

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[1] No person or entity other than The Surety Association of America made any monetary contribution to the preparation or submission of this Brief, and counsel for the parties did not author this Brief in whole or in part.

[2] The surety is both a party to a contract with the United States (the Bond itself) *Balboa Ins. Co. v. United States*, 775 F.2d 1158 (Fed. Cir. 1985) and subrogated to the rights of the prime contractor who was in privity of contract with the United States. *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 83 S.Ct. 232, 9 L. Ed. 2d 190 (1962).

extent of Blue Fox's equitable lien and the Army's duties in disposing of the contract funds after receiving notice that Blue Fox had not been paid for its work.

Both parties have consented to the filing of this Brief.

STATEMENT OF THE CASE

The Umatilla Army Depot Switch project required construction of a substantial building complete with mechanical and electrical systems. (Choate[3] Affidavit ¶ 8 [App. 60]), Lumley[4] Aff. ¶ 3 [App. 24]).

As originally issued by the Army, the contract solicitation obligated the prime contractor to provide the performance and payment surety bonds required by the Miller Act, 40 U.S.C. § 270a, *et seq.*, (Choate Aff. ¶ 6 [App. 59], Sawyers[5] Aff. ¶ 6 [App. 63]).

On July 22, 1993, the Army's Contracting Specialist, Elizabeth K. Faler, spoke with the Army Judge Advocate General's Office in regard to the bond requirement on the project. According to Ms. Faler's Memorandum of the Conversation [App. 44], she was told that "only VERDAN could get the bonds and that we did not have a contract with

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[3] Hildegard Choate is the Army's Contracting Officer (Choate Aff. ¶ 2 [App. 58]).

[4] David L. Lumley is the president of respondent Blue Fox, Inc. (Lumley Aff. ¶ 1 [App. 23]).

[5] Erlinda M. Sawyers is a Contracting Officer for the SBA (Sawyers Aff. ¶ 1 [App. 62]).

VERDAN's subs. She was very adamant about the subject. She kept referring to VERDAN as the prime . . . "

In a memorandum of a telephone conversation later on July 22 with the Small Business Administration ("SBA"), Ms. Faler recognized that Verdan would not qualify for the Miller Act bonds. [App. 45-46]. The Army decided to disregard the correct advice of its own lawyer and delete the requirement that Verdan furnish the Miller Act bonds. Instead, the Army required that the subcontractor constructing the building (ultimately Blue Fox) provide bonds. (Faler Memorandum of Meeting dated August 3, 1993 [App. 47-48]). This protected the Army by assuring that a responsible party was obligated to construct the building, but it left Blue Fox without payment bond protection.

Blue Fox completed all work under its subcontract (Lumley Aff. ¶ 5 [App. 24], and the Army paid Verdan in full for Blue Fox's work ($231,759.08) plus another $37,722.91 "due to overcharges or misidentified charges made in the invoices submitted by Verdan," (Choate Aff. ¶ 9 [App. 60]). Verdan nonetheless failed to pay Blue Fox $46,586.14 owed under the subcontract (Lumley Aff. ¶ 5 [App. 24]).

Blue Fox notified the Army on May 26 and June 15, 1994 that Verdan had not paid it for completed work on the project. [App. 29-33]. Subsequent to receipt of these letters, the Army made the following payments to Verdan [App. 34]:

July 5, 1994	$54,561.27
August 25, 1994	30,073.06
October 11, 1994	1,498.00
	$86,132.33

Verdan did not complete the project and was eventually terminated by the Army (Choate Aff. ¶ 7 [App. 59]). After the termination, the Army still held $84,910.52 of contract funds (Choate Aff. ¶ 15 [61]).

The Army hired another contractor to complete Verdan's contract and do additional work not required of Verdan (Choate Aff. ¶ 12 [App. 60]). It used the $84,910.52 still in its hands to pay for the completion and for extra work outside the scope of Verdan's contract. (Choate Aff. ¶ 14 [App. 61]). The additional cost of the completion work and extra work was paid from other sources. (Choate Aff ¶ 14 [App. 61]).

Blue Fox filed the instant suit seeking, among other relief, an equitable lien on the contract funds and an injunction against their use for purposes other than payment of Blue Fox. (A copy of the Complaint is Appendix E to the Petition for *Certiorari*). The District Court granted the Army's motion for summary judgment on the ground that sovereign immunity barred the suit. (1996 WL 293363) The Ninth Circuit reversed in part and remanded the case to the District Court, 121 F.3d 1357 (9th Cir. 1997).

SUMMARY OF ARGUMENT

The Army received the benefit of Blue Fox's work, and Blue Fox was entitled to an equitable lien on all contract funds in excess of the cost to complete the project. When Blue Fox notified the Army that Verdan had failed to pay for Blue Fox's work, the Army became a stakeholder of the contract funds and had a duty either to pay Blue Fox directly or to withhold the amount owed to Blue Fox from the payments otherwise due Verdan.

The Army could not meet this duty by paying the wrong party, Verdan, at the expense of Blue Fox. The $86,132.33 which the Army wrongfully disbursed is still part of the contract balance. Blue Fox's equitable right to this contract fund is superior to any competing claim and prevents use of the fund for any purpose other than to pay Blue Fox.

Even if the Administrative Procedure Act, 5 U.S.C. § 702, did not waive sovereign immunity to allow Blue Fox to sue the United States to obtain payment, it certainly authorized a suit for injunctive relief to preserve the contract funds and restrict their prospective use.

ARGUMENT

The Miller Act, 40 U.S.C. § 270a, *et seq.*, required the Army to obtain performance and payment bonds from Verdan. If the Army had complied with the Miller Act, the payment bond surety would have paid Blue Fox and stated a claim to the contract funds as a subrogee of Blue Fox. Since the Army did not obtain the required bond, this case presents the issue which this Court found was not present in *United States v. Munsey Trust Company*, 332 U.S. 234, 67 S.Ct. 1599, 91 L. Ed. 2022 (1947):

> We need not decide whether laborers and materialmen would have any claim to the retained percentages, if both contractor and surety failed to pay them.

332 U.S. at 242.

A. The Army was a Stakeholder of the Contract Funds Claimed by Blue Fox and Verdan.

Upon receiving notice that subcontractors or suppliers are unpaid, the United States becomes a "stakeholder" of any funds which are due and payable under the contract. That is, the contracting agency owes the payment to someone, and this is true whether or not the contract work is complete. In *Balboa Ins. Co. v. United States*, 775 F.2d 1158 (Fed. Cir. 1985), the court stated:

> We agree with the conclusion of the Court of Claims that, upon notification by the surety of the unsatisfied claims of the materialmen, the Government became a stakeholder with respect to the amount not yet expended under the contract that it holds at the time of notification of default. However, we can discern no reasonable basis for the Government's distinction between retainages and progress payments when, as in this case, the surety informed the Government of the contractor's alleged breach before the payment was disbursed.

Some courts, including the Federal Circuit in *Balboa*, have drawn a distinction between progress payments during contract performance and payments after completion of the work in terms of the standard by which the government's action will be judged. Before completion, the government has its own interest in seeing that the work is completed promptly, and that interest has to be factored in with the unpaid subcontractor's equitable claims. This gives the government some discretion in handling a progress payment as opposed to an unconditional duty not to pay a defaulting contractor after the work is physically complete. *Balboa Ins. Co., supra*; *Argonaut Ins. Co. v. United States*, 434 F.2d 1362 (Ct. Cl. 1970); *Royal Indemnity Co. v. United States*, 529 F.2d 1312 (Ct. Cl. 1970); *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d 622 (Ct. Cl. 1982); *United States Fidelity & Guaranty Co. v. United States*, 475 F.2d 1377 (Ct. Cl. 1973).

In the instant case, the District Court granted the Army's motion for summary judgment on sovereign immunity grounds, and the Ninth Circuit reversed and remanded for further proceedings. On remand, Blue Fox can attempt to prove that at the time Blue Fox gave written notice that it had not been paid,[6] the Army held sufficient funds both to complete the contract and pay Blue Fox for its work,[7] and that under the factors set out in *Balboa* and other similar cases the Army abused its discretion in releasing payments to Verdan after notice of its default by failing to pay Blue Fox.

For purposes of this appeal, the issue is jurisdiction to hear Blue Fox's case, not the ultimate merits of that case, and the Army should be considered a mere stakeholder of the contract funds claimed by Blue Fox and Verdan.

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[6] May 26 and June 15, 1994.

[7] Subsequent to receipt of Blue Fox's notice, the Army paid $86,132.33 to Verdan and $84,910.53 of contract funds to Dynamic Concepts, Inc. to complete the project and do some additional work. The total paid to Dynamic Concepts ($126,772.78) exceeded the then available contract funds ($84,910.53) by $41 862.25. If the money wrongfully paid to Verdan had remained in the Army's hands, it could have paid the completion and other costs with $44,270.08 left to pay Blue Fox. In addition, the Army admits that Verdan was overpaid $37,722.27 for the construction work, and some part of the money paid to the Dynamic Concepts was for work outside the scope of Verdan's contract. (Choate Aff. ¶ 9 [App. 60])

B. Blue Fox Had an Equitable Lien on the Contract Funds Superior to Any Competing Claim by Verdan.

This Court has consistently recognized the equitable claims of subcontractors and suppliers to be paid out of contract funds. In *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404, 28 S.Ct. 389, 52 L.Ed. 547 (1908), this Court held that a surety which had paid for the labor and material furnished for use in constructing a public building was subrogated to the rights of the persons it paid and accordingly had a claim to contract funds which was superior to the rival claim of an assignee of the contractor. The Court recognized that the surety's rights were derived from those of the laborers and materialmen:

> It paid the laborers and materialmen, and thus released the contractor from his obligations to them, and to the same extent released the government from all equitable obligations to see that the laborers and supplymen were paid.

208 U.S. at 410.

In *United States v. Munsey Trust Company*, 332 U.S. 234, 67 S.Ct. 1599, 91 L.Ed. 2022 (1947), this Court held that the set off right of the United States was superior to the paying surety's

claim as subrogee of unpaid laborers and materialmen.[8] The court stated:

> But the surety urges that it is subrogated also to the rights of laborers and materialmen whom it paid and of the United States. From *Prairie State Nat. Bank of Chicago v. United States*, 164 U.S. 227, 17 S.Ct. 142, 41 L.Ed. 412, to *American Surety Co. of New York v. Sampsell*, 327 U.S. 269, 66 S.Ct. 571, 90 L.Ed. 663, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money. But in all those cases, the owner was a mere stakeholder and had no rights of its own to assert.

332 U.S. at 240.

The *Munsey Trust* court also found that the laborers and materialmen did not have *enforceable* rights against the United

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[8] The result in *Munsey Trust* has been criticized, *See Restatement of the Law Third, Suretyship and Guaranty* (American Law Institute, 1996) at § 34 and particularly the Reporter's Note to Comment d on p. 134; Mungall, "The Buffeting of the Subrogation Rights of the Construction Contract Bond Surety by *United States v. Munsey Trust Co.*," 46 *Ins. Couns. J.* 607 (1979), and limited to set off against a payment bond surety's claim. A performance bond surety's benefit to the obligee is more direct, and as a subrogee of the owner it prevails over a set off claim. *Trinity Universal Ins. Co. v. United States*, 382 F.2d 317 (5th Cir. 1967) *cert. den.* 390 U.S. 906 (1968); *Aetna Casualty & Surety Co. v. United States*, 845 F.2d 971 (Fed. Cir. 1988). In any event, this is not a set off case. The Army did not use the contract funds to pay an unrelated claim the United States may have had against Verdan. The Army was a stakeholder and paid Verdan.

States[9] and questioned the surety's ability to pay the laborers and materialmen and then assert their claims as if they had not been paid.

Any confusion in the *Munsey Trust* decision over the surety's subrogation rights was resolved by *Pearlman v. Reliance Insurance Company*, 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962), which limited *Munsey Trust* to set off cases in which the United States has its own claim to the contract funds and reaffirmed the rule of *Henningsen* that the paying surety's right to contract funds was superior to the competing claim of the contractor (or, in *Pearlman*, the contractor's trustee in bankruptcy). The *Pearlman* court held:

> We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, would have become entitled to the fund; and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it.

371 U.S. at 141.

The lower courts have consistently followed *Henningsen*, *Munsey Trust* and *Pearlman* to award the payment bond surety

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9 The *Munsey Trust* decision predated the 1976 amendments to the Administrative Procedure Act, and the court was not able to consider whether the waiver of sovereign immunity in § 702 would render a subcontractor's rights enforceable.

contract funds which the United States retains as a stakeholder[10] over competing claims by the contractor[11] or those claiming through the contractor such as trustees in bankruptcy[12] or assignee banks.[13]

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10 See generally, Mungall, "The Buffeting of the Subrogation Rights of the Construction Contract Bond Surety by *United States v. Munsey Trust Co.*" 46 *Ins. Coun. J.* 607 (1979); Bachrach, editor, *The Subrogation Database: Cases Concerning the Subrogation Rights of the Contract Bond Surety* (American Bar Association, 1995); Bachrach and Burch, "The Surety's Subrogation Rights" in Gallagher, editor, *The Law of Suretyship* (American Bar Association, 1993).

11 See, for example, *Home Indemnity Co. v. United States*, 376, F.2d 890 (Ct. Cl. 1967); *Fireman's Fund Ins. Co. v. United States*, 421 F.2d 706 (Ct. Cl. 1970); *Argonaut Ins. Co. v. United States*, 434 F.2d 1362 (Ct. Cl. 1970); *Int. Fidelity Ins. Co. v. United States*, 25 Cl. Ct. 469 (1992). *The Subrogation Database, Id.*, pages C211-C217.

12 *In re J.V. Gleason Co.*, 452 F.2d 1219 (8th Cir. 1971); *In re Dutcher Constr. Co.*, 378 F.2d 866 (2d Cir. 1967); *McAtee v. United States Fidelity & Casualty Co.*, 401 F.Supp. 11 (N.D. Fla. 1975); *In re Modular Structures*, 27 F.3d 72 (3rd Cir. 1994); *In re Pacific Marine Dredging and Constr.*, 79 B.R. 924 (Bankr.D. Ore. 1987); *In re Massart Co.*, 105 B.R. 610 (W.D. Wash. 1989); *In re Alcon Demolition, Inc.*, 204 B.R. 440 (Bankr. N.J. 1997); *Segovia Dev. Corp. v. Constructora Maza, Inc.*, 628 F.2d 724 (1st Cir. 1980). *Cf. Universal Bonding Ins. Co. v. Gittens and Sprinkle Enterprises, Inc.*, 960 F.2d 366 (3rd Cir. 1992), which erroneously found the contract funds to be part of the bankruptcy estate but required them to be held in trust to pay the subcontractors and suppliers. *See The Subrogation Database, supra.*, pages C303-C313.

13 *In re Modular Structures*, 27 F.3d 72 (3rd Cir. 1994); *Transamerica Ins. Co. v. Barnett Bank of Marion Co.*, 540 So.2d 113 (Fla. 1989); *Kimberly-Clark Corp. v. Alpha Building Co.*, 591 F.Supp. 198 (N.D. Miss. 1984); *Mid Continent Casualty Co. v. First National Bank & Trust Co.*, 531 P.2d 1370 (Okla. 1975); *Royal Indemnity Co. v. United States*, 93 F.Supp. 891 (Ct. Cl. 1950). *See The Subrogation Database, supra.*, pages C261-C298.

In the instant case, of course, there is no surety, but the cases in which payment bond sureties have claimed contract funds are relevant because the sureties' claims are based in part on subrogation to the equitable rights of the laborers, materialmen and subcontractors whom the sureties paid. If a surety has a claim to contract funds by virtue of its subrogation to the rights of a subcontractor whom it paid, logically the subcontractor can assert the rights itself if there is no surety.[14]

When unpaid subcontractors have sued to recover contract funds, the courts have recognized their equitable right to payment. In at least three cases involving the U.S. Postal Service,[15] circuit courts awarded contract funds to subcontractors. In *Kennedy Elec. Co. Inc. v. United States Postal Service*, 508 F.2d 954 (10th Cir. 1974), the Postal Service failed to obtain Miller Act bonds and a subcontractor was unpaid. The Tenth Circuit relied on this Court's decisions in *Henningsen*, *Munsey Trust* and *Pearlman* to award full payment to the subcontractor out of funds retained by the Postal Service and wrongfully paid to the contractor's assignee. The court stated:

> In the case at bar the contractor failed to pay and there is no surety. Department had the benefit of the services and material furnished by the subcontractor and the asset created by that benefit was transferred to

14 *See generally*, Gallagher, "Unpaid Subcontractors' or Suppliers' Right to Payment Out of Contract Funds," *The Construction Lawyer*, Vol. 10, No. 1 (American Bar Association Forum Committee on the Construction Industry, January 1990).

15 Congress has waived sovereign immunity for the Postal Service in 39 U.S.C. § 401 which authorizes the Postal Service to sue and be sued.

> Service, which also has the retainage. Although the Supreme Court has not decided the specific point now in issue, there is no discernible difference between the equities of the sureties, which were upheld in Prairie State Bank and Henningsen, and the equities of the subcontractor now suing.

In *Active Fire Sprinkler Corp. v. U.S. Postal Service*, 811 F.2d 747 (2nd Cir. 1987), the subcontractor lost its rights against the contractor's sureties by letting the one year limitation period of the Miller Act[16] expire. It then sought payment out of contract funds in the hands of the Postal Service. The rival claimants were the unpaid subcontractor and the sureties, and the court held that the subcontractor could recover. The court stated:

> Active asserts that it had equitable rights in the Contract Balance held by USPS at the time this suit (the Lien Action) was commenced. We agree. It is not new law that unpaid subcontractors hold an equitable interest in a contract balance owed by a building owner to a general contractor.

811 F.2d at 755.

The Second Circuit emphasized that the equitable rights of the unpaid subcontractor were superior to any competing claim by the sureties even though the sureties had paid their entire bond penalty to other claimants. *American Surety Co. v. Westinghouse Electric Mfg. Co.*, 296 U.S. 133, 56 S.Ct. 9, 80 L.Ed. 105 (1935) and *American Surety Co. of New York v.*

16 40 U.S.C. § 270b(b) (1998).

Sampsell, 327 U.S. 269, 66 S.Ct. 571, 90 L.Ed. 663 (1946), reached the same conclusion.

Wright v. U.S. Postal Service, 29 F.3d 1426 (9th Cir. 1994), reversed the dismissal of an equitable lien suit by three unpaid subcontractors against the Postal Service. The decision addresses jurisdictional issues and, citing *Pearlman*, *Henningsen* and *Active Fire Sprinkler*, assumes that the unpaid subcontractors have a cause of action to establish and enforce equitable liens.

These Postal Service cases, of course, relied upon the waiver of sovereign immunity in the Postal Reorganization Act.[17] Although subcontractors' attempts to use the Tucker Act[18] to sue agencies for which Congress has not waived sovereign immunity have failed on jurisdictional grounds, the courts have recognized the existence, if not the enforceability, of the subcontractors' equitable liens on contract funds.

In *United States Fidelity & Guaranty Co. v. United States*, 475 F.2d 1377 (Ct.Cl. 1973), the Court of Claims held that unpaid subcontractors could not sue the United States but recognized their equitable rights to the contract funds. The Court urged the Navy either to pay the subcontractors voluntarily or file an interpleader. In *United Electric Corp. v. United States*, 647 F.2d 1082 (Ct.Cl.) *cert. den.* 454 U.S. 863 (1981), the Court of Claims reconsidered its holding in *USF&G* in light of the Tenth Circuit's *Kennedy Electric* decision. The Court of Claims distinguished *Kennedy Electric* on the ground

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[17] 39 U.S.C. §§ 101, *et seq.* The waiver of sovereign immunity is § 401(1).

[18] 28 U.S.C. § 1491.

that Congress had waived sovereign immunity for suits against the Postal Service, and again held that the Tucker Act does not grant jurisdiction over a direct subcontractor suit. The Court also, however, urged that the subcontractor be paid, and stated:

> But the existence of equitable rights in subcontractors (as well as other laborers and materialmen) does not mean that they, too, can sue the United States directly for their part of the retained funds--perhaps unfortunately, Congress has not consented to that class of suit and the subs' right (*sic.*) remain unenforceable against the United States under the Tucker Act.

647 F.2d at 1086.

In the instant case, therefore, Blue Fox had an equitable right to payment out of any contract funds which exceeded the cost to complete the contract. For present purposes, the Army should be considered a stakeholder of the funds in its hands at the time Blue Fox gave notice of Verdan's failure to pay for Blue Fox's work. The competing claimants were Blue Fox and Verdan, and as between them Blue Fox had superior equities.

C. Upon Receipt of Notice From Blue Fox, the Army had a Duty Either to Pay Blue Fox, Withhold the Amount Claimed or File an Interpleader.

When Verdan failed to pay Blue Fox, it breached its contractual obligation to the Army just as surely as if it had failed to construct the building per the project plans and specifications. Indeed, when it notified the SBA that Verdan was in default, one of the breaches upon which the Army relied was the failure to pay Blue Fox. [App. 36]. In *Pearlman v.*

Reliance Ins. Co., 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962), this Court held that the contractor would have been entitled to the contract fund "had he completed his job and paid his laborers and materialmen." 371 U.S. at 141. *Martin v. National Surety Co.*, 300 U.S. 588, 57 S.Ct. 531, 81 L.Ed. 822 (1937), held that a contract payment to an assignee should be turned over to pay laborers and materialmen in part because the failure to pay them was a breach of both the statutory payment bond and the underlying construction contract.[19] Verdan was not entitled to receive the contract funds.

When the United States is a stakeholder of contract funds and is notified that a subcontractor is unpaid, it has the obligation to respect the equitable rights of the subcontractor. Even if the subcontractor cannot sue to enforce its rights, the United States cannot pay the contract funds to a competing claimant with an inferior claim.

United States Fidelity & Guaranty Co. v. United States, supra., stated:

> The issue is, quite simply, to whom should the Government pay this fund? The fund would ordinarily be owed to the prime contractor had it paid all of its obligations to the subcontractors, but when the Government is in the position of a stakeholder, it is not free simply to pay the contractor when the surety has given adequate notice of other competing claims to the fund.

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19 Lower courts following *Pearlman* and holding that failure to pay subcontractors bars the prime contractor's claim to contract funds include *In re Modular Structures*, 27 F.3d 72 (3rd Cir. 1994) and *In re Pacific Marine Dredging and Constr.*, 79 B.R. 924 (Bankr. D. Ore. 1987).

475 F.2d at 1380.

On the other hand, the United States cannot pay the surety if subcontractors remain unpaid. *North Denver Bank v. United States*, 432 F.2d 466 (Ct.Cl. 1970); *United States Fidelity & Guaranty Co. v. United States, supra.*

The result is that the United States must either voluntarily pay the subcontractor, file an interpleader or hold the contract funds. *United Electric Corp. v. United States, supra.* states:

> As we have done before, we stress that the United States may voluntarily choose to make payment . . . and we believe that it has a nonenforceable obligation to do so, when and if it becomes clear that United had a valid claim, that contract retainages or other unexpended funds under the contract are available for such payment, and that, if those funds are not paid out, the Government will be receiving a windfall which it should not have.

647 F.2d at 1087.

The Court of Claims in *United States Fidelity & Guaranty Co. v. United States, supra.*, stated:

> In an effort to dispose of this problem once and for all, this court recommends that the Navy simply pay the contesting laborers and materialmen according to the pro rata division employed by the Massachusetts District Court or file an action in interpleader in that or another appropriate court.

475 F.2d at 1383.

D. The Army Could Not Decide the Competing Claims of Blue Fox and Verdan by Paying the Wrong Party.

In *Newark Ins. Co. v. United States*, 169 F.Supp. 955 (Ct.Cl. 1959), the court stated:

> Surely a stakeholder, caught in the middle between two competing claimants, cannot, in effect, decide the merits of their claims by the mere physical act of delivering the stake to one of them. If his position as stakeholder becomes uncomfortable, and the claimants do not take steps to get a judicial solution of the question, the law has provided him with an interpleader proceeding by which he can deposit the stake in court and walk out free of the annoyance of being in the middle.

Home Indemnity Co. v. United States, 376 F.2d 890 (Ct.Cl. 1967), followed *Newark* and held:

> In view of plaintiff's equitable rights in the fund, which were superior to those of the contractor, the Government had no right as a stakeholder to settle the question unilaterally by paying the fund to the contractor.

Cases following the rule of *Newark Ins.* and *Home Indemnity* include *District of Columbia v. Aetna Ins. Co.*, 462 A.2d 428 (D.C. 1983); *Fireman's Fund Ins. Co. v. United States*, 421 F.2d 706 (Ct. Cl. 1970); *Argonaut Insurance Co. v. United States*, 434 F.2d 1362 (Ct. Cl. 1970); *United States Fidelity Guaranty Co. v. United States*, 475 F.2d 1377 (Ct. Cl. 1973); *Great American Ins. Co. v. United States*, 492 F.2d 821

(Ct. Cl. 1974); *International Fidelity Ins. Co. v. United States*, 25 Cl.Ct. 469 (1992); and *Transamerica Premier Ins. Co. v. United States*, 32 Fed.Cl. 308 (1994).

E. The Amount Wrongfully Paid Verdan Remains Part of the Contract Balance

At the time Blue Fox filed suit, the Army still held sufficient contract funds to pay Blue Fox. These funds apparently were used to pay for completion of the work. If the wrongful payments to Verdan are included, however, the Army had enough money both to complete the work and pay Blue Fox.

This appeal involves sovereign immunity and the District Court's jurisdiction to hear Blue Fox's case not the merits of that case. Even if the following argument that the wrongful payments to Verdan must be disregarded were incorrect, the District Court had jurisdiction to decide Blue Fox's claim to an equitable lien on the funds unquestionably in the Army's possession.

After receiving notice that Verdan had failed to pay Blue Fox, the Army paid Verdan $86,132.33. The respective claims of Blue Fox and Verdan to the contract funds, however, must be judged as of the date Blue Fox gave notice of Verdan's default.

Balboa Ins. Co., supra, quoting from *National Surety Corp. v. United States*, 319 F.Supp. 45 (N.D. Ala. 1970) states:

> The surety's rights apply to the *total fund*, no matter what it is called, which remains in the hands of the United States (or any owner-obligee) *at the time notice of default* under its bond is established.

775 F.2d. at 1163, emphasis by the court in *Balboa*.

Transamerica Insurance Co. v. United States, 31 Fed. Cl. 532 (1994), states:

> Similarly, Transamerica may assert a claim to the contract balance as it existed when Transamerica notified defendant on February 6, 1990 of Hirt's default.

31 Fed.Cl. at 536.

The amount of which the Army was a stakeholder, therefore, is the $171,042.85 in its possession when Blue Fox gave written notice. Subsequently, of course, the Army paid Verdan $86,132.33 out of that sum and used the balance of $84,910.52 to complete the work.

If the Army had no contract funds at the time Blue Fox gave notice, then Blue Fox would have no claim. An unpaid subcontractor does not have a right to be paid by the United States. It has an equitable lien or security interest in the particular contract funds held by the United States.

That equitable lien can be defeated by a superior right to the fund such as the right of the United States to complete the project or, under *Munsey Trust*, to setoff an unrelated debt owed by the prime contractor against the contract fund.[20] It cannot,

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[20] Since the contract fund is not owed to the contractor it is not logical to allow the setoff of a debt owed by the contractor against funds owed to the surety. The Surety Association respectfully disagrees with the result in *Munsey Trust*, see Note 8 *supra*., but *Munsey Trust* also explicitly states that it is not considering the rights of subcontractors if neither the contractor nor the surety paid them. The Court at least left open the possibility that the equities of an unpaid subcontractor would outweigh the government's right of setoff.

however, be defeated simply by paying the fund to the wrong party.[21]

In *Pearlman v. Reliance Ins. Co., supra*. the contract fund had actually been paid to the contractor's trustee in bankruptcy who argued that it was property of the bankruptcy estate. The Court stated the issue as:

> So here if the surety at the time of adjudication was, as it claimed, either the outright legal or equitable owner of this fund, or had an equitable lien or prior right to it, this property interest of the surety never became a part of the bankruptcy estate to be administered, liquidated, and distributed to general creditors of the bankrupt.

371 at U.S. 136.

The Court rejected the trustee in bankruptcy's argument and held that the fund was the property of the subrogated surety.

In *Martin v. National Surety Co.*, 300 U.S. 588, 57 S.Ct. 531, 81 L.Ed. 822 (1937), the contract funds were paid to an assignee of the defaulting prime contractor who was compelled to pay them into Court pending a decision. The Court awarded the fund to the unpaid laborers and materialmen.

Thus, the payment of the fund to the contractor's assignee or trustee did not terminate the materialmen's equitable lien. In

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[21] See Part D., *supra*.

Martin and *Pearlman* the funds were under the Court's control, so there was no need to address the owner's possible liability. Both *Pearlman* and *Martin*, however, recognize the existence of an equitable lien which was not discharged by the fact of payment.

In *Kennedy Elec. Co. v. United States Postal Service*, 508 F.2d 954 (10th Cir. 1974) the money which the Postal Service admitted it held was insufficient to award the subcontractor full payment, but the Postal Service had made a progress payment to the defaulting contractor's assignee with knowledge that the subcontractor was unpaid. The Court treated both the money admittedly in the Postal Service's possession and the progress payment as "retainage" (508 F.2d at 958) and held:

> The subcontractor has an equitable lien both on the fund remaining in the Service's hands and on the money wrongfully paid to the assignee.

508 F.2d at 960.

Active Fire Sprinkler v. United States Postal Service, 811 F.2d 747 (2nd Cir. 1987) also involved a claim to funds which had purportedly been disbursed with knowledge that the subcontractor was unpaid. The Second Circuit held that payment of the funds on which the subcontractor sought to establish its lien to the wrong party had no effect on the equitable lien. The Court held that the subcontractor was entitled to recover from the Postal Service "based upon the Contract Balance held by USPS at the time the Lien Action was commenced." 811 F.2d at 758.

Blue Fox's equitable lien or security interest attached to the funds in the Army's hands when the Army received notice that

Verdan had not paid Blue Fox. The lien was an *in rem* interest not a cause of action against the Army. The lien was not defeated by wrongful payments to Verdan, and Blue Fox's rights remain in place against the contract balance less amounts paid to complete the work.

F. At the Very Least, Blue Fox is Entitled to Equitable Relief Preserving the Contract Fund.

In *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), the District Court reversed the administrative disallowance of certain Medicaid costs. The Court of Appeals affirmed that aspect of the District Court's decision and directed that the case be remanded to the Secretary of the Department of Health and Human Services. The Court of Appeals assumed the Secretary would abide by the court's interpretation of the Medicaid Act but expected a suit in the Claims Court would be necessary to recover past due funds if that assumption was wrong. Both sides' petitions for *certiorari* were granted. The Secretary argued that the Claims Court had exclusive jurisdiction and Massachusetts argued that the District Court could grant it monetary relief short of "money damages."

The majority opinion in *Bowen* states:

> We agree with the position advanced by the State in its cross-petition -- that the judgments of the District Court should have been affirmed in their entirety--for two independent reasons. First, neither of the District Court's orders in these cases was a "money judgment," as the Court of Appeals held. The first order (followed in the second, see Part I, supra) simply "reversed" the "decision of the Department Grant Appeals Board of the United States Department

of Health and Human Services in Decision No. 438 (May 31, 1983)." It is true that it describes Decision No. 438 as one that had disallowed reimbursement of $6,414,964 to the State, but it did not order that amount to be paid, and it did not purport to be based on a finding that the Federal Government owed Massachusetts that amount, or indeed, any amount of money. Granted, the judgment tells the United States that it may not disallow the reimbursement on the grounds given, and thus it is likely that the Government will abide by this declaration and reimburse Massachusetts the requested sum. But to the extent that the District Court's judgment engenders this result, this outcome is a mere by-product of that court's primary function of reviewing the Secretary's interpretation of federal law.

> Second, even if the District Court's orders are construed in part as orders for the payment of money by the Federal Government to the State, such payments are not "money damages."

487 U.S. at 909-910.

Justice White's Concurring Opinion in *Bowen* agrees with the majority's interpretation of the District Court's decision, and thus with the majority's first reason to affirm the District Court, but not with the proposition that 5 U.S.C. § 702 allowed entry of an Order for the payment of money. 487 U.S. at 912.

Justice Scalia's dissenting opinion, joined by Chief Justice Rehinquist and Justice Kennedy, rejects as form over substance the first alternative advanced by the majority. 487 U.S. at 915-917. The dissenting opinion also states, however, that but for

the availability of a remedy in the Claims Court (and, therefore, a § 704 bar to Massachusetts' action)[22] the District Court could have granted prospective equitable relief:

> I agree with the Court that sovereign immunity does not bar respondent's actions insofar as they seek injunctive or declaratory relief with prospective effect. An action seeking an order that will prevent the wrongful disallowance of future claims is an action seeking specific relief and not damages, since no damage has yet occurred.

487 U.S. at 921-922.

Each Justice, therefore, agreed that 5 U.S.C. § 702 would have waived sovereign immunity for Massachusetts to seek an Order from the District Court with only prospective effect to prevent wrongful disallowance of future claims.

Hubbard v. Administrator, Environmental Protection Agency, 982 F.2d 531 (D.C. Cir. 1992) upheld an order that the Environmental Protection Agency ("EPA") employ Mr. Hubbard even though it found that § 702 did not waive sovereign immunity to allow the court to award him back pay. Mr. Hubbard clearly would be paid by EPA in the future as a consequence of his coerced employment, but the Court had no difficulty with that aspect of the case.

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[22] 5 U.S.C. § 704 states, in part, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." In the instant case Blue Fox clearly had no adequate remedy in the Claims Court.

Dia Navigation Co. v. Pomeroy. 34 F.3d 1255 (3rd Cir. 1994) granted a declaratory judgment voiding the Immigration and Naturalization Service's rule on detention of stowaways pending decision on their asylum requests even though it also held that payment for the cost of detaining the four specific stowaways involved was "money damages" not available under § 702. Again, the court ordered equitable relief which would have a prospective economic impact, but it stopped short of an order compelling the payment of money.

Applying this minimum scope of § 702 to the facts of the instant case, the District Court could have done formally what the Court of Claims repeatedly stated informally and enjoined any prospective use of the contract funds for a purpose other than paying Blue Fox. The Court of Claims held that the Tucker Act did not give it jurisdiction over suits by unpaid subcontractors, but it also recognized the equitable rights of the subcontractors and urged the government to use remaining contract funds to pay the subcontractors either directly or by filing an interpleader. Of course, the Court of Claims could not compel the contracting agency to do so, but it did reject any competing claim.

In its Complaint in the District Court (Appendix E to the Petition for *Certiorari*), Blue Fox specifically asked for an Order declaring that it had an equitable lien on retained funds under the contract (¶ 2(a) of the prayer for relief) and that the Army be enjoined from paying any further moneys under the contract until Blue Fox is paid for its work (¶ 2(f) of the prayer for relief). Even if this Court does not agree with the Ninth Circuit that "an action for specific performance for the payment of money is not an action for money damages," 121 F.3d at 1359, it does not have to agree with the District Court that sovereign immunity barred all of Blue Fox's claims. At least,

Blue Fox was entitled to an Order preserving the contract balance at the time it gave notice of its claim and enjoining payment of the contract funds for any purpose other than completion of the project (which has now been accomplished) and payment of Blue Fox.

The wrongful "agency action" in the instant case was not the Army's failure to require Miller Act bonds. That failure may have cost Blue Fox $46,586.14, but an award on that basis would be "money damages" for the Army's breach of its statutory duty. It would be a substitute for the money the surety would have paid had the Army complied with the Miller Act. The operative wrongful agency action was the Army's payment of $86,132.33 to Verdan, after notification that Verdan had failed to pay Blue Fox, in violation of Blue Fox's equitable lien on the contract balance.

Congress appropriated money to pay for the Umatilla Army Depot Switch project. The Army's obligation was to spend that money according to the law. At least $86,132.33 of Congress' appropriation (less legitimate completion costs) is still in the Army's hands. Blue Fox is entitled to an Order preserving that fund. If there is any doubt about Congressional appropriations, it is for the money wrongfully paid Verdan not the contract balance on which Blue Fox has an equitable lien.

Blue Fox is not seeking an "alternative" to the remedy Congress provided in the Miller Act. The payment bond requirement of the Miller Act protects subcontractors on federal projects, but it was not intended to do so by reducing any rights they otherwise had including an equitable lien on unexpended contract funds. *Pearlman v. Reliance Ins. Co., supra.* rejected that argument stating:

> Neither this slight difference in the new and the old Acts nor any other argument presented persuades us that Congress in passing the Miller Act intended to repudiate equitable principles so deeply imbedded in our commercial practices, our economy, and our law as those spelled out in the Prairie Bank and Henningsen cases.

371 U.S. at 140.

The Miller Act did not set parameters for suits by subcontractors against the United States. It does not "impliedly forbid" such suits under the APA. It would be ironic indeed if a statute which was supposed to help assure payment for work on federal projects could be used to prevent such payment.

Finally, the limited relief urged here by the Surety Association would be completely consistent with the long-standing precedent of this Court and the specialized courts dealing with federal contracts. These Courts have repeatedly recognized that unpaid subcontractors have an equitable right to be paid out of contract funds superior to any competing claim by the defaulting contractor. The Court of Claims especially was adamant that even if the Tucker Act did not give it jurisdiction over a suit by unpaid subcontractors, it would preserve the contract funds for the benefit of the subcontractors and prevent anyone else from obtaining them while the subcontractors were unpaid.

CONCLUSION

Whether Blue Fox can or cannot sue the United States, pursuant to the Administrative Procedure Act, for specific performance of an equitable obligation to pay money, it had an equitable lien on the contract funds held by the Army. The Army's wrongful payment to Verdan did not discharge or terminate that lien, and the Army still holds the $86,132.33 wrongfully paid to Verdan (less any legitimate completion costs chargeable against it). There is no rival claimant entitled to those funds, and even if the Army cannot be compelled to pay Blue Fox under the APA waiver of sovereign immunity, it can be ordered not to use the contract funds for any other purpose.

The Army's first mistake was its failure to secure the bonds required by the Miller Act. The Army's second mistake was releasing funds to Verdan after notice that Blue Fox was unpaid. Both mistakes prejudiced Blue Fox which lost the bond protection mandated by Congress and, under the District Court's decision, the equitable security established by the case law. To date, the winner is Verdan, the defaulting prime contractor, which neither paid its bills nor completed its work but received the contract funds. The loser, through no fault of its own, is Blue Fox which performed its work but is unpaid. This unhappy state of affairs was caused by the Army's mistakes, and to the extent possible under the law, the loss should be shifted from the innocent Blue Fox to the culpable Army. This would place the loss on the party in a position to have prevented it, and would be consistent with this Court's long established recognition of the equitable rights of unpaid subcontractors on public works projects.

Amicus Curiae The Surety Association of America does not take a position on whether the sovereign immunity waiver of 5 U.S.C. § 702 permits an Order for specific performance of the Army's equitable obligation to pay Blue Fox out of available contract funds. If it does not, however, the Surety Association requests that the Court hold that § 702 does permit this action to go forward for Blue Fox to prove that it had an equitable lien on the contract funds in the Army's hands, that upon receipt of notice that Blue Fox was unpaid, the Army became a stakeholder of the amount owed Blue Fox, that the wrongful payments to Verdan did not destroy Blue Fox's equitable lien and that the Army can be enjoined from using the contract funds for any purpose other than payment of Blue Fox.

Respectfully submitted,

Edward G. Gallagher
Wickwire Gavin, P.C.
8100 Boone Boulevard, Suite 700
Vienna, Virginia 22182
(703) 790-8750

Counsel of Record for *Amicus Curiae*
The Surety Association of America

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IN THE
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OCTOBER TERM, 1998

THE UNITED STATES DEPARTMENT OF THE ARMY,
Petitioner,
v.
BLUE FOX, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN SUBCONTRACTORS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID R. HENDRICK
Counsel of Record
STEPHANIE M. WARSHAL
HENDRICK, PHILLIPS, SCHEMM & SALZMAN
1800 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303-1514
(404) 522-1410

JOEL S. RUBINSTEIN
BELL, BOYD & LLOYD
1615 L Street, N.W., Suite 1200
Washington DC 20036
(202) 466-6300
Counsel for American Subcontractors Association

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BRIEF OF THE AMERICAN SUBCONTRACTORS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The American Subcontractors Association ("ASA") is a national trade association representing approximately 6,000 member companies doing business in virtually all states, who employ approximately 100,000 employees engaged in the construction business. Its members comprise businesses of all sizes which, as subcontractors, suppliers, fabricators and manufacturers, provide labor, materials and services on public and private construction projects throughout the United States.

[1] This brief was authored in whole by David R. Hendrick, Esq., Stephanie M. Warshal, Esq. and Joel S. Rubinstein, Esq., counsel for the American Subcontractors Association, *Amicus Curiae*. No person or entity other than the American Subcontractors Association has made a monetary contribution to the preparation or submission of this brief. Letters of consent as required by Supreme Court rule 37.3 are appropriately filed with the clerk of this court.

This issue now before the Court involves protection of a subcontractor's right to secure payment for work performed on a federal public works project by impressing an equitable lien on contract funds held by the public owner, which the general contractor is financially unable to pay, the statutorily required Miller Act payment bond is non-existent or otherwise insufficient to effect payment, and the public owner benefitting from the subcontractor's work is aware of the non-payment and is yet holding funds dedicated to that construction contract. This Court's decision will have significant impact on the subcontractor community. Therefore, ASA presents this Amicus Brief to underscore the legitimate and compelling interests of the Respondent, Blue Fox, Inc., and of subcontractors generally, in the validation of the established equitable principle allowing an unpaid subcontractor on a federal construction project to impress and enforce against contract monies held by the government an equitable lien to secure its right to payment. As an Association representing construction industry subcontractors, many of whom do business regularly on federal construction projects, the *Amicus Curiae* has a strong and abiding interest in a decision by this Court that would clearly serve the legislatively and judicially recognized interests in assuring payment to subcontractors for work properly performed for the benefit of the public by securing an equitable lien on contract funds earned, albeit indirectly, by such performance and held by the public owner of the project. Thus, ASA supports the position of the Respondent in this equitable lien action. ASA urges that the decision of the United States Court of Appeals for the Ninth Judicial Circuit now before this Court for review by writ of certiorari be affirmed.[2]

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[2] ASA is joined in the positions advanced in this Amicus Curiae brief by the following similar situated construction industry trade associations:

(a) The National Electrical Contractors Association, an organization of electrical construction specialty contractors, representing more than 53,000 electrical construction contracting firms.

(b) The Sheet Metal Air Conditioning Contractors National Association represents 4,500 contractors in the sheet metal and air conditioning industry.

(c) The Mechanical Contractors Association of America, Inc. represents 2,000 heating, air conditioning, refrigeration, plumbing, piping and service contractors.

(d) The Association of Wall and Ceiling Industries-International represents wall and ceiling contractors, manufacturers, suppliers/distributors and others allied to the fields of acoustics, drywall, EIFS, fireproofing, insulation, plaster, steel framing and stucco.

THE SUBCONTRACTOR'S PAYMENT DILEMMA— AN OVERVIEW

Considering the manner in which the industry operates, in today's market and economy, subcontractors are the largest single force and factor in the actual performance of labor on construction projects. In years past, the general contractors performed much of the work on the project with their own forces. Times have changed and general contractors, in order to reduce their risk, are acting more and more as labor brokers by subcontracting the lion's share of the work to their subcontractors. The significance of this evolving relationship is that subcontractors are the major contributors in the contract chain with the most dollars at risk. The struggle for payment between contractors and subcontractors is an ongoing dilemma for the industry. The public interest is best served by policies which ensure that subcontractors will be paid reasonably for their work.

Most of the labor and materials required for construction projects is generally provided by subcontractors, who do not have direct contractual relationship with or recourse against the owner of the project benefitting from such labor and materials incorporated into it. Subcontractors work behind the payment curve. On top of this, subcontractors are generally smaller more economically

fragile businesses which must receive prompt payment for their work in order to replenish their limited working capital to stay in business. Subcontractors necessarily incur the bulk of the cost of their performance as they proceed with their work, paying suppliers and laborers first out of current funds, irrespective of whether or when they actually receive payment for such work themselves. Then they later seek reimbursecent of such costs through the monthly or periodic progress payment process. There is often a substantial lag between when the subcontractor actually incurs these costs of performance and when its expended working capital is replenished by payment. As a practical matter, if subcontractors are functionally serving as bankers to a construction project, investing that limited working capital and hoping to be repaid, they should, like any banker, have appropriate security for their loans. This is especially true on public projects where the public at large benefits from the investment of the subcontractor's resources. Nevertheless, they commit their labor and resources to a project trusting that when their work has been incorporated into the project, they will get paid within a reasonable time.

Critical to the decision of subcontractors to furnish labor, materials and services is the assurance that they will ultimately receive payment for the benefits that they confer through their work on the project. Reflecting the impact on society and the business world which would result from chronic payment risk, there has evolved a substantial and recognized public policy which generally favors assurance of or security for payment of subcontractors in order to encourage their participation in the construction process. On private, non-governmental construction projects, such assurance is generally derived from the security for payment afforded by state mechanics and materialimans lien laws. A subcontractor is able to exercise such lien rights arising under state statutory law against the real property being improved with its labor

and materials as an essential means of ultimately securing the right to payment.

On a public project, however, there are generally no analogous statutory lien rights allowed against the improved public property itself. Legislatures have recognized the need to protect the interests of subcontractors and suppliers in obtaining payment for the labor, materials and resources invested in public works. Accordingly, the federal government, as well as all states, have enacted legislation requiring contractors on public projects to post payment bonds to ensure payment of subcontractors. On federal projects, such as that at issue here, such protection is afforded by the Miller Act, 40 U.S.C. § 270a, *et seq*. Subcontractors enter into contracts for federal public works projects with the reasonable expectation that their interest in payment for the labor, materials and services provided in building public works will be adequately secured by such a statutory payment bond. This Act is for the especial protection of the subcontractor on a government construction project by providing security assuring their payment. This security is critical to the decision of subcontractors and suppliers to furnish labor, materials and services.

The Miller Act, and many similar state laws, fail to directly address whether and in what form the subcontractors are afforded recourse when either an invalid payment bond is posted or no payment bond is posted at all. In the instant case, the Ninth Circuit recognized that the Miller Act's silence regarding a remedy for subcontractors in such a circumstance does not extinguish a subcontractor's right to equitable relief directed, not against the public entity itself or the "public purse," but rather as an equitable lien against funds already dedicated to pay for the construction services and held by the public owner.

ASA urges that the limited form of "security" for payment on public works projects allowed by the Court of Appeals below reasonably balances and protects the legiti-

mate public interest, on one hand, of avoiding unpredictable claims being asserted against public coffers, while, on the other hand, serves the countervailing and equally compelling public interest of assuring that subcontractors participating in public construction projects will receive payment that they have honestly earned.

SUMMARY OF ARGUMENT

Federal and state courts have recognized the equitable lien doctrine and have applied the doctrine to permit a subcontractor on a public works project, where no valid payment bond was obtained and the general contractor failed to pay the subcontractor, to recover directly from contract funds held by the public owner. To hold otherwise is to allow the public owner to be unjustly enriched by the subcontractor's work. This equitable remedy does not violate the Administrative Procedures Act, as the relief sought by the subcontractor is not "money damages" or uncommitted money from the Treasury, but instead is drawn from funds held by the public owner specifically for the construction project and the benefit of those working on it. This equitable lien claim is simply an equitable action to recover the very thing to which the subcontractor is entitled—the contract funds held by the public owner for its payment.

ARGUMENT

I. PUBLIC POLICY PREDICATED UPON FAIRNESS AND EQUITY SUPPORTS APPLICATION OF EQUITABLE LIEN DOCTRINE

Synthesizing what appear to be uncontested facts underlying this dispute as set forth by the Court below and in the "Brief for Petitioner" and the "Brief for the Respondent", it appears that substantial equities flow in favor of the Respondent in this matter, Blue Fox, Inc. ("Blue Fox"). That is where this *Amicus Curiae* submits that inquiry should begin.

Clearly, this construction project by the United States Department of the Army was subject to the requirements of the federal Miller Act, 40 U.S.C. 270a, *et seq*. Accordingly, the prime contractor was required to furnish, *inter alia*, the statutorily required "payment bond . . . for the protection of all persons supplying labor and materials." 40 U.S.C. § 270a(a)(2). The Respondent would, and should, have been an interested beneficiary entitled to the assurance of payment afforded by such a payment bond. As this Court has explained, "the Miller Act was designed to provide an alternative remedy to the mechanics' liens ordinarily available on private construction projects [citation omitted] because 'a lien cannot attach to government property,' persons supplying labor and materials on a federal construction project were to be protected by a payment bond." *J.A. Bateson Company v. United States* ex rel *Board of Trustees of National Automatic Sprinkler Industry Pension Fund*, 434 U.S. 586, 589 (1978). This whole remedial scheme, however, fails of its essential purpose if the required payment bond is not procured by the prime contractor or if the bond procured is ultimately determined to be financially insufficient due to the failure, insolvency, or inability to find the surety on the bond.[3]

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[3] *Amicus Curiae* acknowledges the limited access that has been afforded subcontractors and suppliers to assert direct claims for money damages against the federal government and federal government employees when a Miller Act payment bond fails or is not obtained. *See, Blue Fox Inc. v. Small Business Association*, 121 F.3d 1357 (1997) (dissent); *Hardaway Company v. U.S. Army Corps of Engineers*, 980 F.2d 1415 (11th Cir. 1993); *West Bay Steel, Inc. v. United States*, 970 F.2d 648 (9th Cir. 1992); *Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287 (7th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). However, the existence of the statutory remedy provided by the Miller Act against a surety does not preclude other remedies which may exist under common law and equitable remedies against the government. *See, Arvanis, supra.* Many states have acknowledged this entitlement of a subcontractor to some form of relief when a payment bond on a public project fails or is not obtained either by statute, common law, or both. Among the state court holdings that a public owner and/or public

Of course, the Petitioner, here, was the singular party to this chain of contractual relationships that was in the best position to assure that a Miller Act payment bond was properly furnished as statutorily required. The Petitioner, in fact, was the *only* party with the requisite knowledge and authority to require that such payment bond be furnished. However, in the instant matter, it appears not only that the Petitioner failed to assure that the required payment bond was furnished to afford payment protection of subcontractors, including the Respondent, but, more significantly, it also appears that the Petitioner improperly and intentionally sought to avoid the Miller Act payment bond requirement without setting in place the several alternative processes permitted to protect the payment rights of the subcontractors. This conscious avoidance of the Miller Act bonding requirements goes beyond mere oversight or inadvertence—or even negligence. The Petitioner

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official is liable in damages to an unpaid subcontractor providing labor, material or services to a public works project where the statutory "little Miller Act" payment bond is not furnished or required or proves to be fraudulent, insolvent or insufficient to satisfy the payment obligations are: *Hall County School District v. C. Robert Beals & Associates*, 498 S.E.2d 72 (Ga. 1998); *Palm Beach Co. v. Trinity Industries, Inc.*, 661 So.2d 942 (Fla. DCA 4th 1995); *DeKalb County v. J&A Pipeline Company, Inc.*, 437 S.E.2d 327 (Ga. 1993); *Kammer Asphalt v. East China Township Schools*, 504 N.W.2d 625 (Mich. 1993); *National Oil & Supply, Inc. v. Voaughts, Inc.*, 856 S.W.2d 912 (Mo. Ct. App. 1993); *East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.*, 601 N.E.2d 972 (Ill. App. 1992); *Threlkeld-Covington, Inc. v. Baker Drywall Co., Inc.*, 837 S.W.2d 840 (Tx. App. 1992). States expresly providing a statutory right of action by subcontractors against public owners who fail to secure a payment bond from the general contractor on public works include Georgia (O.C.G.A. § 36-82-102); Idaho (Idaho Code § 54-1928); Iowa (Iowa Code § 573.2); Minnesota (Minn. Stat. § 574.28); Montana (Mont. Code Ann. § 18-2-202); Oregon (Or. Rev. Stat. § 279.542); South Dakota (S.D. Codified Laws § 5-21-2); Utah (Utah Code Ann. § 14-1-19); and Washington (Wash. Rev. Code § 39-08.015).

apparently knowingly and intentionally sought to waive or avoid the payment bond requirement without affording subcontractors any alternative security or assurance, or even affording them the courtesy of clear advance notice of the absence of the payment bond protection which would otherwise have been normally anticipated.

Respondent prosecuted and completed its subcontract scope of work by May of 1994, at which time it was owed by the prime contractor a final subcontract balance of $46,586.14. When no payment of this balance due was received from the prime contractor, Respondent gave written notices of the nonpayment to the Petitioner on May 26 and June 15, 1994. On or about June 15, 1994, Respondent first was informed that no Miller Act payment bond had been furnished. The Petitioner was then yet holding $171,042.85 in unpaid prime contract funds. Respondent requested that Petitioner suspend or reduce further payment to the prime contractor to assure payment of this subcontract balance. To the contrary, however, the Petitioner proceeded to disburse over the next several months an additional $86,132.33 out of such contract funds to the prime contractor (likely including portions attributable to Respondent's subcontract performance). The Petitioner apparently took no action to enforce pass through of such payment and Respondent received nothing. Eventually, several months later, Petitioner terminated the prime contract while $84,910.50 of contract funds were still held by Petitioner, noting that one of its most severe iterms of concern was the failure by the prime contractor to pay the $46,586.14 due its subcontractor, the Respondent—perhaps in its belated recognition of the consequences upon Respondent arising out of Petitioner's ongoing failure to protect that subcontractor's right to payment. Respondent now asserts that it is entitled to impress an equitable lien on the contract funds held by Respondent at the time of notice of nonpayment and, if not then, at the time of termination due to that very nonpayment.

Were such unpaid subcontractors left without "equitable lien" recourse against contract funds held by the public owner and dedicated for use in payment for construction services provided benefitting the project, the public owner would actually have a disincentive to require a payment bond, with its attendant extra cost, or to declare a prime contractor in default for failure to post a proper payment bond with the attendant delay, disruption and expense to the public works project. If the legal consequences on the public owner were as advocated here by the petitioner —namely no exposure whatsoever under legal, contractual, statutory or equitable grounds—then the unpaid subcontractor's plight would be as described in the dissent of Judge Ryner in the Ninth Circuit's decision below, namely "the hapless subcontractor . . . left holding the bag." *Blue Fox, Inc. v. Small Business Administration,* 121 F.3d 1357, 1363 (9th Cir. 1997) (quoting from *Automatic Sprinkler Corp. v. Durla Envt'l. Specialists, Inc.,* 53 F.3d 181, 182 (7th Cir. 1995)). Conversely, ASA urges on behalf of its subcontractor members and the Respondent herein that this Court take the opportunity in resolving this case to complete the picture only roughly suggested in *United States v. Munsey Trust Co. of Washington, D.C.,* 332 U.S. 234, 242 (1947) by the dictum that "[w]e need not decide whether laborers and materialmen would have any claim to the retained percentages, if both contractor and surety failed to pay them." This picture was further developed in this Court's decision in *Pearlman v. Reliance Insurance Company,* 371 U.S. 132, 141 (1962) in which it held that "the laborers and materialmen had a right to be paid out of the [retained contract] fund." The Ninth Circuit, in the decision below, has decided this issue in the affirmative, invoking application of the "equitable lien" doctrine, in its well reasoned majority opinion, and this *Amicus Curiae* submits that this result is reasonable, equitable and fully supportable under the guidance of the following body of established precedent. Allowing enforcement of an equitable

lien against the withheld contract funds comports with the equitable principles deeply embedded in our jurisprudence and accomplishment of the ends of substantial justice. *Cf. Pearlman v. Reliance Insurance Company,* 371 U.S. 132 (1962).

II. BLUE FOX HAS AN ENFORCEABLE EQUITABLE LIEN AGAINST THE CONTRACT MONIES HELD BY THE GOVERNMENT AFTER NOTICE THAT VERDAN HAD NOT PAID BLUE FOX

"An equitable lien arises '[w]here property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched.'" *Embree Construction Group, Inc. v. Rafcor, Inc.,* 411 S.E.2d 9616 (N.C. 1992), quoting Restatement of Restitution § 161, "It would be manifestly unjust for an owner to withhold final payment from the contractor out of concern for the subcontractors and then disregard the subcontractors' interests by failing to distribute the retainage. In such a case there can be no doubt that equity and justice would recognize the subcontractors' claims against the contract balance." *Willard, Inc. v. Powertherm Corp.,* 444 A.2d 93, 97-98 (Pa. 1982); see also Restatement of Restitution § 160 (1937).

The equitable lien doctrine has been recognized as conferring rights on unpaid subcontractors on public works projects under both state and federal law. A number of state courts have applied this principle to protect the interests of subcontratcors providing services on public works. *See, e.g., Architectronics, Inc. v. Salem-American Ventures, Inc.,* 350 So.2d 581 (Fla. 2nd DCA 1977); "The doctrine of equitable liens came into existence to remedy those situations where, as here, there is either an absence of an available lien or no adequate remedy at law." *Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc.,* 423 So.2d 500 (Fla. 3rd DCA 1982). The equitable lien doctrine arises "out of a general considera-

tion of right and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case." *Id.* Courts have found the doctrine applicable both in instances where there the subcontractor has a statutory right to recover from the public owner where no valid payment bond has been obtained, and where no such right exists. The Georgia Supreme Court has recently recognized an unpaid subcontractor's "equitable lien" claim seeking to enforce a lien "against funds which are being held by the Appellant [the public owner]." *DeKalb County v. J.A. Pipeline Co., Inc.*, 437 S.E.2d 327, 333 (Ga. 1993). That court rejected a sovereign immunity defense by distinguishing an equitable lien claim as one not seeking to impose any liability against the public owner, but rather only as an equitable remedy against contract funds themeselves held by the public owner. *Accord, Hall County School District v. C. Robert Beals & Associates*, 498 S.E.2d 72 (Ga. 1998). In Colorado, the Colorado Court of Appeals held in *First National Bank of Paonia v. K.N.J., Inc.*, 867 P.2d 152, 155 (Colo. Ct. App. Div. V, 1993) that an unpaid subcontractor on a United States Forest Service contract, "[i]n addition to a remedy under the Miller Act, . . . holds an equitable lien on any earned, yet unpaid contract funds." Further, the court noted that this "equitable right of material suppliers and laborers extends to money payable under the contract that is still in the hands of the United States." *Id.* The Massachusetts Supreme Court has recognized the particularly equitable claim of those responsible for completion of building contracts to be paid from available monies ahead of others whose claims come from the mere advance of money, which may be enforced by way of a "constructive trust" claim.[4] *Superior*

[4] Analogously, other courts have reached essentially the same result by employing a "constructive trust" theory to afford claims by unpaid subcontractors on government construction projects against contract funds held by the public owner or traceable to a third party. *E.g., Kammer Asphalt Paving Co., Inc. v. East China Township Schools*, 504 N.W.2d 635 (Mich. 1993); *First Bulloch & Trust Company v. Inca Materials, Inc.*, 880 F.2d 1307 (11th Cir. 1989); *Bethlehem Steel Corporation v. Tidwell*, 66 B.R. 932 (U.S.D.Ct., M.D. Ga. 1986); *United Parcel Service Inc. v. Weber Industries, Inc.*, 795 F.2d 1005 (5th Cir. 1986); *United Pacific Insurance Co. v. Ripsom*, 1984 W.L. 8269 (Del. Chancery Court, 1984) (surety's equitable lien against unpaid contractor funds arises out of a constructive trust in favor of laborers, materialmen and subcontractors by subrogation upon payment by the surety); *Selby v. Ford Motor Company*, 590 F.2d 642 (6th Cir. 1978) (applying Michigan law).

Glass Company, Inc. v. First Briston County National Bank, 406 N.E.2d 672 (Mass. 1980). The Florida Court of Appeals recognized, in a private construction project context, that the "equitable lien doctrine is firmly established in Florida" to benefit an unpaid subcontractor or supplier by allowing recourse against unpaid contract funds in *Peninsular Supply Company v. C.B. Day Realty of Florida*, 423 So.2d 500, 503 (Fla. App. 3d Dist. 1982). In *General Acrylics v. USF&G*, 623 P.2d 839 (Ariz. App. 1980), the Arizona Court of Appeals acknowledged that laborers and materialmen have an equitable lien as to funds in the hands of the government which are earned but unpaid.

This equitable lien concept has been applied in the context of federal public works as well. In *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404, 410 (1908), this Court stated that the government has an equitable obligation to ensure the payment of laborers and suppliers on government construction projects. This Court found again in *Pearlman v. Reliance Insurance Company*, 371 U.S. 132, 141 (1962), that laborers have the right to be paid out of any unpaid contract balance when an insolvent general contractor fails to pay them for their work. In both of these cases, the Court recognized that sureties who have compensated the unpaid laborers and suppliers have a similar claim against the unpaid subcon-

tract balance, which claim would be superior to claims of the insolvent general contractor in bankruptcy and its creditors in bankruptcy. Such a claim would arise because the surety is subrogated to the rights of the laborers and suppliers. *Henningsen v. United States Fidelity & Guaranty Co., supra,* at 410.

If the surety is subrogated to the unpaid laborers' and suppliers' rights, it is readily apparent that those selfsame unpaid laborers and suppliers have a claim against the unpaid subcontract balance. It would make no sense whatsover to allow a surety to claim superiority while disallowing such a claim—indeed a right—to an unpaid laborer or supplier.

The rights of subcontractors to claim a lien arise by operation of law; that is, they arise out of the equitable principles protecting unpaid federal subcontractors. This Court has recognized the equitable doctrine that when a payment bond surety satisfies the claims of unpaid laborers and suppliers, including subcontractors, on a federal building project, the surety is subrogated to their rights to claim payment out of the contract balance still owed by the government. *Prairie State Bank v. United States,* 164 U.S. 227 (1896); *Henningsen v. United States Fidelity & Guaranty Co., supra,* at 410. In *Pearlman v. Reliance Insurance Co., supra,* this Court rejected the argument that the Miller Act was intended to repudiate the equitable principles recognized in *Prairie State Bank* and *Henningsen.*

Decisions by three different Circuits have recognized that a subcontractor's right to claim a lien against monies held by the government should rise to at least the same level as those rights that a surety may claim as set forth in *Prairie State Bank* and *Henningsen.* These decisions are: *Wright v. U.S. Postal Service,* 29 F.3d 1426 (9th Cir. 1994); *Active Fire Sprinkler Corp. v. U.S. Postal Service,* 811 F.2d 747 (2nd Cir. 1987); and *Kennedy Electric Co., Inc. v. United States Postal Service,* 508

F.2d 954 (10th Cir. 1974).[5] As stated in *Kennedy Electric Co., Inc., supra,* ". . . there is no discernible difference between the equities of the sureties, which were upheld in *Prairie State Bank* and *Henningsen,* and the equities of the subcontractor. . . ." *Id.* at 960. In *Active Fire Sprinkler Corp., supra,* at 755, the court observed that the subcontractor:

> . . . asserts that it had equitable rights in the Contract Balance held by USPS at the time this suit (the Lien Action) was commenced. We agree. *It is not new law that unpaid subcontractors hold an equitable interest in a contract balance owed by a building owner to a general contractor.* (Emphasis added) (Citations omitted.)

It is not necessary to rely on cases involving the United States Postal Service, where sovereign immunity was expressly waived, to find decisions which recognize that subcontractors on federal projects other than the Postal Service have an equitable lien on the unpaid balance. In *Trans-Bay Engineers and Builders, Inc. v. Hills,* 551 F.2d 370, 382-83 (D.C. Cir. 1976), the court approved the doctrines of uniust enrichment and equitable lien as a matter of federal common law and held that these doctrines were available to private parties seeking equitable relief against the government. *See also, e.g., Bor-Son Building Corp. v. Heller,* 572 F.2d 174, 178 (8th Cir. 1978), wherein the court held that the use of a "sue and be sued" clause rearding sovereign immunity waived immunity from suit in a claim for monetary relief based on theories of quantum meriut, equitable lien, constructive trust, unjust enrichment and joint venture. While this Court has clearly recognized a path for relief under an

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[5] While these decisions ultimately permitted an action against the Postal Service because the Postal Service Act had waived sovereign immunity for suits against the Postal Service, these cases nevertheless recognize the concept that the unpaid subcontractor has an equitable lien against the unpaid balance held by the government.

equitable lien doctrine for payment bond sureties asserting the subrogated rights of subcontractors and suppliers that surety has paid, the same path must be available for direct recourse against contract funds held by the public owner by an unpaid subcontractor on its own behalf where no statutory payment bond exists.

For the reasons explained above, and especially the language in *Active Springler*, subcontractors possess an equitable lien in the contract balance owed by the government to a contractor. The government apparently argues that despite the existence of this equitable lien, the subcontractor has no right to enforce this lien based on the doctrine of sovereign immunity.

III. THE REMEDY SOUGHT BY BLUE FOX IS EQUITABLE IN NATURE AND CAN BE GRANTED UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA) waives sovereign immunity to the extent that it permits suits against the United States which seek "relief other than money damages." 5 U.S.C. § 702 (1977).

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), this Court considered a meaning of the exclusion in § 702 for suits seeking money damages The. Court held that the reversal of a disallowance decision by the Commissioner of Health and Human Services, resulting in payment of money by the United States, was not an award of "money damages." 487 U.S. at 893. This Court observed that "[T]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Id.* at 893. Rather, the relevant inquiry identified by this Court is whether the remedy is a "substitute for suffered loss" or "the very thing to which [the plaintiff] was entitled" in the first place. *See also, Katz v. Cisneros*, 16 F3d 1204 (Fed Cir. 1994), where the court stated that "plaintiff

sought payments to which it was allegedly entitled, not 'money as compensation for loss suffered.'"

Both the Second and Third Circuits have held that the lack of a statutory requirement that disputed payments be made directly to the plaintiff does not bar relief. In *Zellous v. Broadhead Associates*, 906 F.2d 94 (3rd Cir. 1990), the government had argued that damages sought were money damages even though the statute did not direct payment to the plaintiff. In *Linca Area Nacional de Chile S.A. v. Meissner*, 65 F.3d 1034 (2nd Cir. 1995), the court held that damages were not "money damages" even though the statute did not explicitly require the Immigration and Naturalization Service to repay expenses incurred by a carrier.

The equitable subrogation cases are analogous, and the government incorrectly notes that none of these cases even involved a claim against the government. The government argues that all of these involved contests between private parties or refunds as to which the United States had disclaimed any ownership and had transferred out of the Treasury. The government is simply wrong. In *National Surety Corporation v United States*, 118 F.3d 1542 (Fed. Cir. 1997), the disagreement was between a performance bond surety of a defaulted government construction contractor and the government. In that case the government did not withhold the required ten percent retention from progress payments as the contract with the defaulted contractor had required. Instead, it made full payment to the contractor which ultimately abandoned the project and thereafter was terminated for default. National Surety filed a claim for the funds that were required to have been retained by the government from progress payments but were instead paid to the insolvent general contractor. Based upon *Prairie State National Bank, supra*, the Court stated that it had long recognized the surety's rights to subrogation, observing that the subrogation right is equitable in origin and in implementation. *Id.* at 1546.

The Second Circuit's decision in *Aetna Casualty & Surety Company v. United States*, 71 F.3d 475 (2nd Cir. 1995), is directly on point. The surety brought suit against the government alleging that it was subrogated to the government's rights against the corporation and that the government tortiously converted the surety's property when it failed to assert an off-set against the tax refund payable to the corporation, which was a principal under the bond. The court rejected the argument that Aetna's amended complaint sought "money damages" which were not allowable under the APA. The court noted that the suit was not for damages "to compensate for the government's failure to pay a duty. Rather, it seeks to require the government to perform its duty—that is, to pay to Aetna funds held by the government for Aetna's benefit." *Id.* at 478. The court concluded that because Aetna sought injunctive relief to force the government to perform a legal obligation, the action is not forbidden by the APA's bar on money damages. *Id.* at 479. In short, *Aetna* stands for the proposition that injunctive relief to compel performance of non-statutory legal obligations is permissible under the APA. The court observed:

> In our view, the Court referred to the question whether there was a statutory duty because in that case the plaintiff was claiming a statutory duty. The opinion rests not on the fact that the federal government's duty was statutory, but rather on a distinction between money damages, which seek to compensate for governmental failure to perform a legal duty, and injunctive relief requiring that the duty be performed. [Citations omitted]. We can see no reason why the *Bowen* holding should be limited to duties prescribed by statute as opposed to those arising under some other rule of law, any more than it should be limited to claims brought by Massachusetts.

Id. at 479.

Other cases are to the same effect. For example, in *Fireman's Fund Insurance Company v. United States*, 421 F.2d 706 (Ct. Cl. 1970), consistent with other case law, the government was held liable where it had notice of the supplier's suit against the surety and of the surety's objection to the government's final payment to the contractor. Under those circumstances payment to the contractor was improper and the government was liable to the surety for improper payment.

Section 702 of the APA acts as a general consent to suit requesting equitable relief from administrative action or inaction. *United States v. Mitchell*, 463 U.S. 206 (1983). In *Rosebud Sioux Tribe v. U.S. Bureau of Indian Affairs*, 714 F. Supp. 1546, 1555 (D.S.D. 1989), the court held that the interplay of § 702 and 28 U.S.C. §§ 1331, 1361 and 1362 provided a sufficient waiver of sovereign immunity and a grant of jurisdiction to entertain equitable claims.

The Postal Service cases are instructive not because of the "sue and be sued" provision but because the analysis in those cases concludes an equitable lien should be recognized under these precise circumstances. *See*, for example, *Wright v. United States Postal Service, supra.* Again, as noted in the preceding section, where the payment bond surety is offered a path to equitable relief against the public owner holding contract funds based on rights subrogated upon its payment of subcontractors and suppliers, those very same unpaid subcontractors and suppliers should not be procedurally foreclosed from asserting such an equitable lien on their own behalf.

Existence of a remedy at law does not deprive one of equity jurisdiction unless the remedy is clear, adequate and complete. *Pomeroy, Equity Jurisprudence*, § 165 (1994) (5th Ed.) describes an equitable lien as simply a right of a special nature over the thing, which constitutes a charge or encumbrance upon the thing, so that "the very thing itself" may be proceeded against in an

equitable action and either sold or sequestered under a judicial decree and its proceeds, in the one case, or its rights and profits, in the other, applied upon demand of the party in whose favor the lien exists. Of particular pertinence here, *Pomeroy* clearly delineates the distinction between equitable liens and money damages. It will be observed that the distinction *Pomeroy* draws is pertinent to this Court's decision in *Bowen* and, indeed, supports Blue Fox's assertion of an equitable lien as falling within the *Bowen* rationale. *Pomeroy* describes the equitable lien in the following terms:

> The remedies of equity are, as a class, specific. Although it is commonly said of them that they are not in rem, because they do not operate by the inherent force of the decree in an equitable suit to change or transfer the title or estate in controversy, yet these remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing—a tract of land, personal property, or a fund—rather than a right to recover a sum of money generally out of the defendant's assets.

Pomeroy, § 234.

Thus, as recognized in *Bowen*, an equitable lien represents a peculiar right over the thing concerning which the contract deals, and it operates directly upon that thing. Even when the controversy concerns pecuniary claims and obligations, and the final relief is wholly pecuniary, the equitable remedies are administered by regarding the subject matter as a specific fund and by adjudging such fund to its single owner, or by apportioning it among the several claimants. *Pomeroy*, § 170. This reemphasizes the distinctive feature of an equitable lien in that it ascertains a rightful claimant's interest in or over a specific thing, land, chattels, choses in action, debts and even money in the form of a fund and follows it through the hands of successive possessors as long as it can be identified. *Pomeroy*, § 170. In *Transamerica*

Insurance Company v. United States, 31 Fed. Cl. 532 (1994), the court ruled that a performance bond surety may bring an equitable subrogation action against the government noting that once the government is informed of the principal's default, it becomes a stakeholder in the contract balance; and since the balance is measured by the time of default, the assessment of liquidated damages cannot operate to defeat the surety's subrogation claim. Similarly, in *Transamerica Premier Insurance Company v. United States*, 32 Fed. Cl. 308 (1994), the surety recovered against the government under the doctrine of equitable subrogation where it had paid a materialman's claim.

In determining whether this court should recognize Blue Fox's equitable lien, the Tenth Circuit's weighing of equities in *Kennedy Electric Co., supra*, should be considered. There, the court found that the subrogated surety analogy was apt and stated:

> The cases such as *Fireman's Fund*, 421 F.2d 706, 19 Ct. Cl. 804, holding that the government cannot escape liability for wrongful payment, concerned Miller Act sureties. The principle is not changed by the fact that here we have an unpaid subcontractor rather than a surety. Department compounded its error in contracting without bond by wrongly paying to an assignee after notice for the subcontractor's cliam. It arrogated to itself determination of entitlement to the fund which it held. The subcontractor had a legally enforceable right against department. . . . The subcontractor has an equitable lien both on the funds remaining in service's hands and on the money wrongfully paid to the assignee.

Id. at 960.

Congress has consented to litigation in federal court seeking equitable relief from the government. *Pullman Construction Industries, Inc. v. United States*, 23 F.3d. 1166, 1168 (7th Cir. 1994). In *Pullman*, the Seventh

Circuit dealt with a civil taxation suit. However, it opined generally on the current status of sovereign immunity, particularly in light of the amendments to § 702 of the APA. The court observed:

> Now that 5 U.S.C. § 702 exposes the United States to equitable relief, it is difficult to speak of federal sovereign immunity as a 'right not to be sued.' It is quite unlike the Eleventh Amendment, which provides that '[t]he judicial power of the United States shall not be construed to extend' to suits against states, and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602-05, which gives foreign governments' 'immunity from the jurisdiction' of our courts. The only portion of the United States' original immunity from suit that Congress continues to assert is a right not to pay damages—a right circumscribed by statutes such as § 106.

Id. at 1168.

The court's decision in *Aetna Casualty and Surety Company v. United States, supra,* 71 F.3d 475, is most instructive. When the government wrongfully pays money to which another has equitable lien, such as Blue Fox had over the balance owed Verdan, § 702 of the APA waives immunity for suit by the party whose equitable rights were violated. Whether the wronged party is a surety, as in *Aetna,* or an unpaid subcontractor, as is Blue Fox in this case, the result should be the same. There is no difference between the equities of the surety and the subcontractor. Thus, if the surety's claim to monies wrongfully paid by the government is an action for relief other than money damages, which it is, the subcontractor's own claim must be considered to be a suit for relief "other than money damages." Thus, Blue Fox's claim of an equitable lien falls squarely within the waiver of sovereign immunity set forth in § 702 of the APA. Since Blue Fox seeks to enforce its equitable lien over the monies held by the government, the suit is not one for money damages. Thus, § 702 of the APA waives sovereign immunity for claims such as Blue Fox.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* American Subcontractors Association respectfully requests that this Court affirm the judgment of the Ninth Circuit Court of Appeals below.

Respectfully submitted,

DAVID R. HENDRICK
Counsel of Record
STEPHANIE M. WARSHAL
HENDRICK, PHILLIPS, SCHEMM & SALZMAN
1800 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303-1514
(404) 522-1410

JOEL S. RUBINSTEIN
BELL, BOYD & LLOYD
1615 L Street, N.W., Suite 1200
Washington DC 20036
(202) 466-6300
Counsel for American Subcontractors Association

No. 97-1642

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE UNITED STATES DEPARTMENT OF THE ARMY,
Petitioner,

v.

BLUE FOX, INC.
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 1998, three copies of the Brief of The Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondent Blue Fox, Inc., were served by prepaid postage, first class mail upon:

Seth Waxman, Esq.
Solicitor General
Room 5614
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(202) 514-2217
Counsel for Petitioner

Thomas F. Spaulding, Esq.
Spaulding Cox & Schaeffer, LLP
1205 N.W. 25th Avenue
Portland, Oregon 97210-2497
(503) 222-3815
Counsel for Respondent

I further certify that all parties required to be served have been served.

Tami Lyn Azorsky
McKenna & Cuneo, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

(9)

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

Of Counsel:

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*Herbert L. Fenster**
David A. Churchill
Tami Lyn Azorsky
Patrick K. O'Keefe
Matthew F. Porter
McKenna & Cuneo, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

**Counsel for Amicus Curiae The Chamber of Commerce of the United States of America*

BEST AVAILABLE COPY

34 pp

QUESTION PRESENTED

The question presented is:

Whether a party may file a claim founded on a contract, seeking relief other than money damages, in district court under the Administrative Procedure Act, 5 U.S.C. § 702 (1994), or whether the Tucker Act, 28 U.S.C. § 1491(a)(1) expressly or impliedly forbids such actions.

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No. 97-1642

In The

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October Term, 1998

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] The Chamber represents an underlying

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae*, its

(Footnote continued on next page)

membership of more than three million businesses and organizations of every size, sector and region, many of which contract with the Federal Government. The Chamber regularly advocates its members' views in court on issues of national concern to the business community.

This Court has long recognized that, when the United States contracts with private companies, the relationship between the parties should be the same as when private companies contract with each other. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (Souter, J., for the plurality) ("'When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'") (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)). The ability to obtain relief other than money damages in cases involving contracts is a cornerstone of contractual relations between private parties.

Likewise, the ability to obtain relief other than money damages for claims founded upon contracts with the Government is of great importance to the huge community that "does business" with the government on a daily basis. Most of that community are members of the Chamber. Because the jurisdictional issues in this case will significantly affect the rights of companies which contract with the Federal Government to seek relief other than money

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members, or its counsel provided any financial support for the preparation of the brief.

Pursuant to Supreme Court Rule 37.3, written consent to the filing of this brief has been obtained from counsel for petitioners and respondents, and the documents reflecting consent have been filed with the Clerk's office.

damages in contract cases, the Chamber has a vital interest in presenting its views on this subject to the Court.

SUMMARY OF ARGUMENT

This case involves the interplay of the waivers of sovereign immunity conferred by the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1994), and the Tucker Act, 28 U.S.C. § 1491(a)(1). In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Court held that claims seeking money damages were subject to the Tucker Act waiver of sovereign immunity, while claims seeking other than money damages were subject to the APA's waiver of sovereign immunity.

Bowen's holding was based on the broad waiver of immunity effected by the 1976 amendments to the APA. Those amendments waived sovereign immunity for claims "seeking relief other than money damages . . . ." 5 U.S.C. § 702. The legislative history of those amendments reveals that Congress intended to "eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful action by an agency or by an officer or employee of the agency." H.R. Rep. No. 94-1656, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123. *See also* S. Rep. No. 94-996, at 2 (1976) ("S. 800 would eliminate the defense of sovereign immunity in Federal court actions for specific relief claiming unlawful action by a Federal agency, officer, or employee.").

Petitioner does not challenge any of the holdings of *Bowen*. Rather, Petitioner urges the Court to refuse to extend the *Bowen* analysis to contract cases. In so doing, Petitioner seeks to impose an artificial limit on the broad waiver of sovereign immunity effected by the APA, by urging the Court to hold that sovereign immunity bars all claims

founded on contract except claims for money damages under the Tucker Act.

The APA's waiver of sovereign immunity does not exclude actions founded on contract. *Bowen* involved a claim founded upon statute. Recently, this Court has applied the *Bowen* framework to claims founded on the Constitution. *See Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, ___ U.S. ___ (1998). There is no basis in the Tucker Act or the APA to distinguish claims founded upon contract from claims founded upon statute or the Constitution.

The time has come for the Court to make clear that the *Bowen* framework applies to claims founded upon contract, just as the Court has applied it to claims founded upon the Constitution and statute. Such clarity will be consistent with the Court's holdings, the APA and the Tucker Act, and will minimize the need for courts to engage in the wasteful exercise of deciding which court should decide the merits of a case.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE REACH OF *BOWEN V. MASSACHUSETS* IN LIGHT OF THE CONFUSION AMONG THE CIRCUITS REGARDING THE JURISDICTION OF DISTRICT COURTS TO DECIDE CONTRACT-RELATED CASES

A. *Bowen v. Massachusetts* Set The Framework For Analyzing Whether An Action Properly Belongs In The District Courts Under The APA Or In The Court of Federal Claims Court Under The Tucker Act

This Court last considered the interplay between the waivers of sovereign immunity conferred by the APA and the Tucker Act in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen* the State of Massachusetts sued the department of Health and Human Services ("HHS") in district court under the APA, challenging HHS' final order refusing to reimburse the State for a category of expenditures under the State's Medicaid program. 487 U.S. at 882. The State alleged that the order violated the Social Security Act and the HHS regulations implementing the Medicaid program, and requested declaratory and injunctive relief requiring HHS to make the reimbursement. *Id.* at 883-88.

The State argued that the district court had authority to grant complete relief under the APA.[2] 5 U.S.C. § 702.

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[2] For claims permitted under the APA waiver of sovereign immunity, jurisdiction is proper in the federal district courts under the federal question statute, 28 U.S.C. § 1331, the declaratory judgment statute, 28 U.S.C. §§ 2201-2202, or the

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The United States argued that the APA did not authorize review because (1) the State sought "money damages" which cannot be recovered under § 702 of the APA;[3] and (2) § 704 of the APA bars relief because the State had an adequate remedy at law, a suit for damages in the Claims Court under the Tucker Act. In essence, the United States contended that the only permissible suit the State could bring was a suit for money damages under the Tucker Act, 28 U.S.C. § 1491(a)(1).

This Court rejected the government's arguments. The Court recognized that payments of money do not always equate to "money damages," and held that a suit in equity to enforce a payment obligation was not a suit for "money damages" excepted from the APA. The Court also recognized that the money damages available in the Claims Court are not always "an adequate substitute" for equitable relief. *Bowen*, 487 U.S. at 905.

Bowen thus recognized that those adversely affected by government action may seek equitable relief and established a framework for analyzing whether an action properly belonged in the district courts under the APA, or in

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mandamus statute, 28 U.S.C. § 1361. *See, e.g., Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986).

[3] Petitioner here also argues that respondent is seeking money damages, and that for this reason the APA waiver of sovereign immunity does not apply. Respondent's action, however, seeks an equitable lien on appropriated funds that have already been obligated to pay for the work respondent performed as a subcontractor to Verdan Technology, Inc. Therefore, on its face, the action is not seeking money damages.

the Claims Court (subsequently renamed the Court of Federal Claims[4]) under the Tucker Act. Consistent with the language of the APA and the Tucker Act, the Court focused on the nature of relief sought by the plaintiff. For actions seeking relief other than money damages, the APA waived sovereign immunity and the action could be brought in district court. For actions seeking money damages, the Tucker Act waived sovereign immunity and the action could be brought in the Claims Court (or, if for $10,000 or less, in district court). 487 U.S. at 893-901.

B. The Courts Of Appeals Have Been Tentative In Applying The *Bowen* Framework To The Three Categories Of Claims Covered By The Tucker Act

Bowen was part of a continuing process by which the Court and Congress have reduced the applicability of the defense of sovereign immunity. *See, e.g.*, S. Rep. No. 94-996, at 3-4 ("Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens.").[5] This Court has

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[4] Pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), the United States Claims Court became the successor to the Court of Claims. Subsequently, pursuant to Title IX of the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992), the United States Claims Court was renamed the United States Court of Federal Claims.

[5] As discussed more fully below, S. Rep. No. 94-996 accompanied the bill that became the 1976 amendments to the APA.

now applied the *Bowen* framework to claims founded upon the Constitution, *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, ___ U.S. ___ (1998), and upon statute. *Bowen v. Massachusetts*, 487 U.S. 879. In both types of cases, this Court has held that a party may seek relief other than money damages in district court under the APA.

The same framework should be applied to cases seeking to enforce rights founded on contracts, which is the third category of claims covered by the Tucker Act. The courts of appeals, however, have been tentative in applying the *Bowen* framework to claims founded on contracts. The United States Court of Appeals for the Federal Circuit has applied this Court's decision in *Bowen* to cases involving contracts with the Federal Government, and has held that, where a claimant seeks relief other than money damages, an action against the Federal Government may lie in the district courts even when the actions are related to or involve a contract. *See, e.g., National Ctr. for Mfg. Sciences v. United States*, 114 F.3d 196 (Fed. Cir. 1997); *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994).

In contrast, the Courts of Appeals for the D.C. and Ninth Circuits have declined to apply *Bowen* to contract cases. Both courts have said that the reasoning of *Bowen* virtually compelled the conclusion that contract actions for other than money damages may be brought under the APA. *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *North Star Alaska v. United States*, 14 F.3d 36 (9th Cir. 1994). Because *Bowen* (in their view) did not involve a contract, however, both courts declined to so rule "[w]ithout more certain direction from the Supreme Court." *Transohio*, 967 F.2d at 613; *North Star Alaska*, 14 F.3d at 38.

Petitioner has sought to capitalize on the confusion among the courts of appeals by attempting to transfer cases to

the court most likely to dismiss them. In *National Center for Manufacturing Sciences*, the plaintiff filed suit in district court under the APA seeking an order directing the Air Force to release funds appropriated for a cooperative agreement between the plaintiff and the government. 114 F.3d at 198. The district court, however, found that the claim was a contract claim against the government in excess of $10,000, and transferred the case to the Court of Federal Claims. *Id.* The plaintiff filed an interlocutory appeal to the Federal Circuit. *Id.*

During the appeal, the government candidly acknowledged that its strategy was to have the case transferred to the Court of Federal Claims, and then to seek dismissal of the complaint on the grounds that the Appropriations Act was not a money-mandating statute, which, in turn, would require the plaintiff to "return to district court and start all over . . . by filing a new complaint, this time avoiding any suggestion in its complaint that the Appropriations Act is a money-mandating statute." *Id.* at 199. The court decried this situation, noting that "[t]his proposed scenario threatens to turn this case into a jurisprudential Flying Dutchman, casting about in search of a court that can reach the merits of [the plaintiff's] claims." *Id.*

Clarity in understanding where a case should be heard would avoid the "Flying Dutchman" scenario. *Id.* Moreover, clear guidance on jurisdictional questions such as those presented in this case will minimize the need for courts to "engage in the wasteful exercise of deciding not how a dispute should be resolved, but what court should be responsible for resolving it." *Id.* at 197, citing *Bowen*, 487 U.S. at 930 ("[n]othing is more wasteful than litigation about where to litigate, especially when all the options are courts within the same legal system that will apply the same law.") (Scalia, J., dissenting).

Only this Court can provide that clarity. Petitioner seeks to undermine the Court's recognition in *Bowen* of the broad waiver of sovereign immunity effected by the 1976 amendments to the APA by imposing a vestigial element of sovereign immunity that does not exist. Petitioner seeks to bar actions for other than money damages that are related in any way to contracts. The Court should provide a clear statement that, pursuant to the Court's reasoning in *Bowen*, the APA waiver of sovereign immunity does not exclude actions founded on contracts. To the extent that the Court of Appeals for the Ninth Circuit held that Respondent could bring this suit even though it related to a contract, the Chamber urges the Court to affirm the Ninth Circuit's decision.

II. THE 1976 AMENDMENTS TO THE APA WAIVED SOVEREIGN IMMUNITY FOR ALL CLAIMS SEEKING RELIEF OTHER THAN MONEY DAMAGES

The 1976 amendments to the APA were intended to effect a broad waiver of sovereign immunity for all claims seeking relief other than money damages. Before the 1976 amendments, section 702 of the APA provided only that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Pub. L. No. 89-554, 80 Stat. 392 (1966). The 1976 amendments added, *inter alia*, the following sentence to section 702:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color or legal authority shall not be dismissed nor relief

> therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Pub. L. No. 94-574, 90 Stat. 2721 (1976). The plain language of this addition states that the APA waives sovereign immunity for all actions seeking relief "other than money damages." No distinction relating to contracts is stated or even implied.

The legislative history of the 1976 amendments reveals that the purpose of those amendments was to eliminate the defense of sovereign immunity in all cases seeking relief other than money damages. For example, the House Report which accompanied S. 800 (the bill that became the 1976 amendments) stated that Congress intended to "eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency." H.R. Rep. No. 94-1656, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123. The Senate report accompanying S. 800 contained a similar statement. *See* S. Rep. No. 94-996, at 2 (1976) ("S. 800 would eliminate the defense of sovereign immunity in Federal court actions for specific relief claiming unlawful action by a Federal agency, officer, or employee.").

Similarly, both the House and Senate reports stated that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." H.R. Rep. No. 94-1656, at 9, *supra*; S. Rep. No. 94-996, at 2. The Senate Report explained that elimination of the doctrine of sovereign immunity in suits seeking relief other than money damages was a necessary reform to

eliminate an obsolete concept and to strengthen the accountability of the Federal Government to its citizens:

> The doctrine of sovereign immunity probably descended from the tenet of medieval English law that the "King can do no wrong." Yet even today, 200 years after the American revolution, the doctrine stands as barrier to the redress of just grievances against the United States Government. *To the extent that this obsolete immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsible Government.*
>
> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens . . . . *S. 800 would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus.*

S. Rep. No. 94-996, at 3-4 (emphasis added). *See also* H.R. Rep. No. 94-1656, at 4, *supra*.

In *Bowen*, the Court recognized the broad waiver of sovereign immunity effected by the 1976 amendments to the APA. The Court noted that "it is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment . . . ." *Id.* at 891-92. Further, the Court noted that the 1976 amendment "was unquestionably intended to

broaden the coverage of § 702 [of the APA]." *Id.* at 896. This waiver does not exclude actions founded on contracts from its reach.

III. THE TUCKER ACT DOES NOT EXCLUDE CLAIMS BASED ON CONTRACT FROM THE WAIVER OF SOVEREIGN IMMUNITY EFFECTED BY THE APA

Petitioner does not challenge any of the holdings in *Bowen*. Instead, Petitioner argues that *Bowen* should not be extended to claims founded on contracts. In order to accept Petitioner's argument, this Court would have to accept two premises. First, the Court would have to agree that under contracts, as distinct from the Constitution and statutes, money damages are always an adequate remedy at law. Second, the Court would have to agree that the Tucker Act impliedly forbids equitable relief based on contract rights. Neither premise is supported by precedent. Accordingly, *Bowen* should be extended to claims founded on contracts.

A. Money Damages Often Do Not Provide An Adequate Remedy For Contract Rights

The APA's broad waiver of sovereign immunity extends only to claims "for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. Petitioner's argument that the APA waiver of sovereign immunity excludes claims based on contracts presumes that money damages always constitute adequate relief for an adverse ef[illegible] on contract rights.

Bowen addressed the adequacy of money damages in the context of a statutory requirement to pay money. *Bowen* 487 U.S. at 901. The Court rejected the Government's argument that section 704 would "bar review of the agency action in the District Court because monetary relief against

the United States is available in the Claims Court under the Tucker Act" as "restrictive" and "unprecedented." *Id.* at 904-05. Because of the "limited relief available in the Claims Court," *id.* at 901, namely that the Claims Court did not have the general equitable powers of a district court, the Court in *Bowen* was unwilling to conclude that "a naked money judgment against the United States will always be an adequate substitute for prospective relief . . . ." *Id.* at 905.

Although *Bowen* involved a statutory scheme, its reasoning applies equally well to an effort to enforce contract rights. *See National Ctr. for Mfg. Sciences,* 114 F.3d at 200-01 (because the Court of Federal Claims could not provide the equitable relief the plaintiff sought, there was no adequate remedy under the Tucker Act); *Transohio Sav. Bank,* 967 F.2d at 608, citing *Bowen* (a money judgment will not always be an adequate substitute for equitable relief). Because of the limited relief available in the Court of Federal Claims, a naked money judgment will not always be an adequate substitute for prospective relief when the government fails to perform its contractual obligations.

It is well-recognized at common law that money damages are not always an adequate remedy for contract-related actions. *See, e.g., Restatement (Second) of Contracts* § 357, 359, 360 (1981) (describing availability of specific performance and injunctive relief for contract actions when damages would not be adequate); U.C.C. § 2-716 (1989) (describing buyer's right to specific performance); *City Stores Co. v. Ammerman*, 266 F. Supp. 766, 776 (D.D.C. 1967) (specific performance of lease appropriate where legal remedies inadequate), *aff'd* 394 F.2d 950 (D.C. Cir. 1968); *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 103 (3rd Cir. 1986) ("Specific performance may be granted by a court of equity in its discretion if there is no adequate remedy at law."); *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 223-24 (1st Cir.

1987) (citing *Restatement (Second) of Contracts* § 360 and drawing analogy to U.C.C. § 2-716.)

Accordingly, there is no presumption in the law that money damages are always an adequate remedy for violations of contract rights. To the contrary, under common law and the Uniform Commercial Code, equitable relief for violations of contract rights is available. Similarly, money damages are not necessarily an adequate remedy when the Federal Government violates contract rights.

B. The Tucker Act Does Not Impliedly Forbid A Party From Obtaining Relief Other Than Money Damages Under The Tucker Act For A Claim Founded Upon A Contract

The second prong of the Government's argument is that the Tucker Act impliedly forbids the relief sought by Respondent. The APA states that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Petitioner argues that the Tucker Act is such a statute.

Petitioner's argument is based solely on the limitations on the authority of the Court of Federal Claims to grant other than money damages in cases filed under the Tucker Act. Br. for Petitioner at 47-49. The Court of Federal Claims' lack of authority to grant equitable relief should not effect the scope of the waiver of sovereign immunity under the APA.

Both the House and Senate reports that accompanied the 1976 amendments to the APA state that the "impliedly forbids" language "merely provides that new authority to grant specific relief is not conferred when Congress has dealt in particularity with a claim and intended a specified remedy

to be the exclusive remedy." S. Rep. No. 94-996, at 12; H.R. Rep. No. 94-1656, at 13, *supra* (same). The question that must be addressed, therefore, is whether the Tucker Act was intended to establish money damages as the exclusive remedy for claims founded on a contract. As the *Bowen* Court stated, the answer is no.[6]

First, the Tucker Act says nothing about the remedies available to a plaintiff. *See* 28 U.S.C. § 1491(a)(1). The restriction to obtaining money damages is derived from the limited authority of the Court of Federal Claims, which cannot grant equitable relief. *See Transohio Sav. Bank*, 967 F.2d at 608, citing *Richardson v. Morris*, 409 U.S. 464, 465 (1973); *United States v. Jones*, 131 U.S. 1 (1889).

Second, in *Bowen* the Court rejected the view that, under the Tucker Act, the Claims Court had exclusive jurisdiction to provide monetary relief. The Court said that the assumption that the Claims Court had such exclusive jurisdiction

> is not based on any language in the Tucker Act granting such exclusive jurisdiction to the

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[6] The legislative history of the 1976 amendments to the APA reveals that the drafters of those amendments did not assume that the Tucker Act imposed any limits on the ability of a plaintiff to seek relief other than money damages under the APA for claims founded on contract. Both the House and Senate reports state that "the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, *if any*, derived from statutes dealing with such matters as government contracts . . . ." S. Rep. No. 94-996, at 12 (emphasis added); H.R. Rep. No. 94-1656, at 13, *supra* (same).

> Claims Court. Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief-other than traditional "money damages"—as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not sufficient reason to bar that aspect of the relief available in a district court.

487 U.S. at 910 n.48.

In other words, the Court said in *Bowen* that the Tucker Act did not forbid a party from obtaining relief in the form of payment of money from the government as an incident to other relief ordered by a district court under the APA. It stands to reason, therefore, that the Tucker Act does not forbid obtaining relief *other* than the payment of money under the APA -- that is precisely the purpose of the 1976 amendments to the APA.

Third, allowing actions for claims founded on contract under the APA is consistent with the purpose of the Tucker Act. The Court of Appeals for the D.C. Circuit has stated that a primary purpose of the Tucker Act is "to ensure that a central judicial body adjudicates most claims against the United States Treasury," *Kidwell v. Army*, 56 F.3d 279, 284 (D.C. Cir. 1995), citing *United States v. Hohri*, 482 U.S. 64, 71-73 (1987) (describing goal of uniformity behind creation of Federal Circuit); *Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 534 (D.C. Cir. 1988) (recognizing Tucker Act's interest in uniformity). Even if

actions founded on contracts seeking relief other than money damages may be brought under the APA, most claims against the United States Treasury (i.e., claims for money damages) still would be resolved by a central judicial body -- the Court of Federal Claims under the Tucker Act. In those cases where a money damages remedy under the Tucker Act would be adequate, an action under the APA would not lie. *See* 5 U.S.C. § 704.[7]

Finally, in *Bowen* the Court cited an action founded on contract as one example of an action that would lie under the APA. The Court quoted extensively from Judge Bork's discussion of the purpose of the 1976 amendment to the APA in *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985). *Bowen*, 487 U.S. at 899 ("Judge Bork's summary of the legislative history is especially convincing."). In particular, the Court cited Judge Bork's discussion of the distinction between claims for money damages (covered by the Tucker Act) and claims for other relief (permitted under the APA). *Id.* at 899-900.

Judge Bork noted that a plaintiff might file an equitable action seeking specific relief that would nonetheless result in the payment of money by the United States to the plaintiff. *Maryland Dep't of Human Resources*, 763 F.2d at 1446. In such cases, because the relief sought would not be money damages, but specific relief, the APA would waive sovereign immunity over a plaintiff's suit. *Id.*

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[7] While an adequate remedy at law may exist in many cases, as noted above, money damages is not always an adequate remedy. Whether money damages would be adequate must be addressed on a case-by-case basis. It cannot be predetermined for all cases involving contract rights.

To illustrate this distinction, Judge Bork noted that "while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' *Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms.*" *Maryland Dep't of Human Resources*, 763 F.2d at 1446, quoting D. Dobbs, *Handbook on the Law of Remedies*, 135 (1973) (emphasis added). The Court in *Bowen* quoted this portion of Judge Bork's decision. *See Bowen*, 487 U.S. at 895.

Judge Bork's example involved an action founded on contract in which the relief included the payment of money (though not money damages). The Court accepted that situation as an example of an action that would lie under the APA. Clearly, therefore, where a party seeks relief that does not even involve the payment of money, the action also would lie under the APA. Nothing in *Bowen* would suggest otherwise.

C. The *Bowen* Framework Should Apply To Claims Founded On Contract

1. This Court Has Applied The *Bowen* Framework To Claims Founded Upon The Constitution And Statute

The Tucker Act waives sovereign immunity for three categories of claims: claims founded upon the Constitution; claims founded upon law (statutes and regulations); and claims founded upon contracts. Nothing in the text of the Tucker Act suggests that claims founded upon contract should be treated any differently from claims founded on the Constitution, statutes, or regulations. 28 U.S.C. § 1491(a)(1). This Court already has determined that the APA waiver of sovereign immunity for suits founded on the Constitution or

statutes are unaffected by the Tucker Act. The rule should be the same for claims founded on contract.

In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, ___ U.S. ___, the Court discussed the appropriate jurisdiction for claims founded upon the Fifth Amendment. As it did in *Bowen*, the Court held that the nature of the relief sought by the plaintiff determined whether the Tucker Act waiver of sovereign immunity or the APA waiver of sovereign immunity applied to such claims.

The plaintiff (Eastern) filed suit in district court seeking, *inter alia*, a declaratory judgment that assessments of premiums under the Coal Act constituted an illegal taking under the Fifth Amendment and violated the Due Process Clause. Because the Tucker Act confers jurisdiction over actions based upon the Constitution for money damages in excess of $10,000, the Court said that "a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance . . . ." 118 S. Ct. at 2144.

However, the Court noted that "Eastern does not seek compensation from the Government. Instead, Eastern requests a declaratory judgment that the Coal Act violates the Constitution and a corresponding injunction against . . . enforcement of the Act as to Eastern." 118 S. Ct. at 2144-45. Therefore, the Court concluded that the district court had jurisdiction over Eastern's claim pursuant to the APA. "Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the

circumstances, and that it is within the district courts' power to award such equitable relief." *Id.* at 2145-46.[8]

Similarly, in *Bowen*, the Court found that the claim, which was founded on statute, could be brought under the APA. The Court held that the Tucker Act did not impliedly forbid relief. There is no suggestion in the Tucker Act (or the APA) that claims founded on contract should be treated differently from claims founded on statute or the Constitution. Like Constitutional and statutory claims for money damages, contract claims for money damages are subject to the Tucker Act waiver of sovereign immunity. But like Constitutional and statutory claims for relief other than money damages, contract claims for relief other than money damages also should be subject to the APA waiver of sovereign immunity.

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[8] Lower courts also have applied the *Bowen* framework to claims founded on the Constitution. *See, e.g., Crane v. United States*, 41 Fed. Cl. 338 (1998) (suit alleging that plaintiff was separated from the Armed Services in violation of Fifth Amendment due process rights and seeking reinstatement was a claim for specific relief which lies under the APA and should be transferred to district court); *Osprey Pacific Corp. v. United States*, 41 Fed. Cl. 150 (1998) (claim for just compensation for taking under the Fifth Amendment properly brought in Court of Federal Claims under the Tucker Act).

2. The Analysis Of *Bowen* In The Courts Of Appeals Is Consistent With Applying The *Bowen* Framework To Claims Founded Upon Contract

The Federal Circuit has extended the *Bowen* decision to contract cases, by applying *Bowen*'s analysis to determine whether an action properly lies in the district courts under the APA or in the Court of Federal Claims under the Tucker Act. In short, the Federal Circuit approaches such cases by focusing on the nature of the relief sought, just as this Court did in *Bowen*. *National Ctr. for Mfg. Sciences,* 114 F.3d 196; *Katz v. Cisneros*, 16 F.3d 1204.

In contrast, both the D.C. Circuit and the Ninth Circuit have declined to extend the *Bowen* framework to actions founded on contract. But in so declining, both circuits have virtually begged for clear guidance from this Court. Moreover, their opinions demonstrate that the application of the *Bowen* framework to contract cases is appropriate.

The Court of Appeals for the D.C. Circuit addressed the issue in *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598. In *Transohio* the plaintiff filed suit in district court under the APA seeking an injunction to enjoin the United States from applying the capital requirements of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") to the plaintiff. Plaintiff alleged that imposing those requirements would violate the statute, violate plaintiff's substanti e due process rights, and constitute a breach of the plaintiff's contract with the United States. *Id.* at 603.

The D.C. Circuit, relying on its prior precedent, distinguished between contract claims and claims founded on the Constitution or a statute:

> The lesson of [our prior case law], we think is straightforward: under § 702 and the Tucker Act, litigants may bring common-law contract claims only as actions for money damages in the Claims Court, but they may bring statutory and constitutional claims for specific relief in federal district court.

Id. at 610. The court recognized, however, the right of a party to bring constitutional or statutory actions under the APA even if the relief requested was the equivalent of specific performance of the contract.

In distinguishing the contract claims, the court recognized that *Bowen* might require a review of the precedent on which the court relied for the distinction. The D.C. Circuit stated:

> *Bowen* suggests that courts may have been reading the Tucker Act too broadly and the APA too narrowly. . . .
>
> There is no hint in *Bowen* that the broad scope of the APA's sovereign-immunity waiver, or the nonexclusivity of Claims Court jurisdiction, varies according to whether the claim involves a contract. Indeed, language in *Bowen* seems to imply the contrary. . . .
>
> Transohio makes a strong case that, after *Bowen*, the Tucker Act should not be read to "impliedly forbid" under the APA the bringing in district court of contract actions for specific relief, that such a result would be faithful to the text of the Tucker Act and the APA, and sensible. Nothing in the language

> of either the Tucker Act or the APA requires special treatment for contract claims. . . .

Id. at 612.

Yet, despite its recognition that nothing in *Bowen* or the Tucker Act justified the court's prior distinction among the categories of claims covered by the Tucker Act, the D.C. Circuit refused to overrule its prior cases.

> *Bowen* did not involve a contract and it did not address the 'impliedly forbids' limitation on the APA's waiver of sovereign immunity. Without more certain direction from the Supreme Court, we decline to overrule this Court's very specific holdings that the APA does not waive sovereign immunity for contract claims seeking specific relief.

Id. at 613.

The Ninth Circuit reached a similar conclusion in *North Star Alaska v. United States*, 14 F.3d 36 (9th Cir. 1994). In that case, the court noted that *Bowen* "could be interpreted as taking a more expansive view of district court jurisdiction under the APA than we have previously recognized." *Id.* at 38. However, because *Bowen* did not involve a contract, the Ninth Circuit, like the D.C. Circuit, declined to overrule its prior case law holding that the APA does not waive sovereign immunity for contract claims seeking equitable relief, "'[w]ithout more certain direction from the Supreme Court.'" *Id.* (quoting *Transohio*, 967 F.2d at 613).

Though they refused to apply *Bowen* to claims founded on contracts, the analysis of *Bowen* in both the D.C. and Ninth Circuits is consistent with the Federal Circuit's

application of the *Bowen* framework to contract cases. It is the D.C. and Ninth Circuits' refusal to extend *Bowen* to contact cases that pointedly demonstrates the need for guidance from this Court. Without such guidance, plaintiffs will continue to face the "Flying Dutchman" scenario, and the courts will continue to engage in the wasteful exercise of deciding who should decide, notwithstanding their apparent understanding that *Bowen* dictates otherwise.

Accordingly, the time has come for this Court to eliminate the confusion. The time has come for this Court to state that the APA has eliminated all vestiges of the defense of sovereign immunity for claims against the United States. It is time for this Court to state that the waiver of sovereign immunity in the APA includes claims founded on contracts when they seek relief other than money damages.

CONCLUSION

For the foregoing reasons, the Court should rule that the APA waives sovereign immunity for all claims against the United States seeking relief other than money damages, even where the action involves a claim founded on a contract. Accordingly, to the extent that the decision below of the Ninth Circuit rests on such an interpretation of the APA and the Tucker Act, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

*Herbert L. Fenster**
David A. Churchill
Tami Lyn Azorsky
Patrick K. O'Keefe
Matthew F. Porter
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

**Counsel for Amicus Curiae*
The Chamber of Commerce
of the United States of
America

Of Counsel:

Robin S. Conrad
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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